Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the lower courts correctly held that a § 2255 habeas corpus petitioner is procedurally barred by the ruling of the appellate court on direct appeal from asserting a constitutional claim that depends on extra-record evidence that could not have been developed at the petitioner's original trial.

(2) Whether petitioner knowingly, intelligently, and voluntarily waived his Fifth Amendment right against self-incrimination where petitioner was induced to make incriminating proffer statements to the government based upon the prosecutor's false assurances as to the circumstances in which the petitioner's statements could be used against him.

RULE 29.6 STATEMENT

Petitioner Robert R. Krilich is a private party.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert R. Krilich, Sr. ("Krilich" or "petitioner"), respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The district court denied petitioner's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence in an unpublished order. App., *infra*, 3a-19a. The district court subsequently denied petitioner's request for a Certificate of Appealability ("COA") and his motion for relief from judgment in a separate unpublished order. *Id.* at 20a-28a. The Seventh Circuit denied petitioner's application for a COA in an unpublished order. *Id.* at 1a.

JURISDICTION

The district court denied petitioner's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence on April 6, 2001. App., *infra*, 20a-28a. On September 28, 2001, the Court of Appeals for the Seventh Circuit denied petitioner's application for a COA. *Id.* at 1a. On December 20, 2001, Justice Stevens extended petitioner's time to file this petition to February 25, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "No person * * * shall be compelled in any criminal case to be a witness against himself * * * ."

28 U.S.C. § 2253(c) provides, in pertinent part, that "[a] certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right," and, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the

court of appeals" from the denial of a petition for a writ of habeas corpus.

STATEMENT

In the spring of 1993, petitioner's son, Rob, learned he was being investigated by federal authorities for fraud. At the time, he had 12 prior convictions and faced substantial federal and state criminal charges. Confronted with the Government's knowledge of his activities, Rob Krilich sought to minimize his exposure, and immediately began to render aid to the U.S. Secret Service, the Federal Bureau of Investigation, and the Office of the U.S. Attorney for the Northern District of Illinois, among other agencies. Throughout these efforts, Rob Krilich was represented by attorney Jeffrey Steinback. R. 1, pp. 3-4.

During this same period, petitioner became the target of a separate federal investigation. The U.S. Attorney's Office investigated petitioner in connection with certain bribes paid to government officials in Oakbrook Terrace, Illinois, and for improper use of tax-free interest earned through the issue of industrial revenue bonds, a portion of which were used to finance low-income and moderate-income housing. R. 1, pp. 4-5.

In March 1993, upon learning that he was a target of the Government's investigation, petitioner also retained attorney Jeffrey Steinback. Thereafter, the U.S. Attorney invited petitioner to cooperate in the investigation of his companies' past activities. Petitioner agreed to cooperate and to provide information to the U.S. Attorney's Office in order to persuade the Government to offer his son more lenient treatment. Steinback represented petitioner in all of his meetings with government representatives, while also continuing to represent his son in his negotiations with prosecutors. R. 1, p. 4; Affidavit of Robert R. Krilich, Sr. (A35), at ¶¶ 12-13.

Prior to making any statements to the Government, petitioner was presented with a "standard proffer letter." That

letter provided that any statements made by him would not be admissible at a trial, except that the Government could introduce such statements "should [petitioner] subsequently testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer." R. 8, Ex. 3. Counsel recommended to petitioner that he sign the proffer agreement, and advised him that if petitioner proceeded to trial, the Government could introduce his statements for impeachment purposes only if petitioner himself testified, and even then only if his testimony was inconsistent with his proffer statements. AUSA Patrick King ("King") likewise assured petitioner that the Government would only introduce his proffer if he testified at trial. At no time did King or any other government representative inform petitioner that his statements could be used against him even if petitioner never testified. R. 1, p. 5; A35-A36, ¶¶ 11-12.

After signing the proffer agreement, petitioner provided statements over a period of months to government investigators that admitted to many of the offenses the Government would later charge. After plea negotiations failed, the Government indicted petitioner on several counts, including violations of the Racketeering Influenced and Corrupt Organizations Act and 18 U.S.C. § 1014.

Petitioner's trial commenced in August 1995. In its case-in-chief, the Government presented several witnesses who testified that petitioner misused bond interest he had obtained by falsifying vendor invoices, and that he paid Richard Sarallo, the mayor of Oakbrook Terrace, sums designed to induce favorable municipal action regarding certain real estate projects. Petitioner's counsel cross-examined these government witnesses, seeking to establish that petitioner did not cause invoices to be falsified and did not bribe Mayor Sarallo. In the defense case, counsel also presented the testimony of several witnesses that a party other than petitioner was responsible for the invoices in question, and that the bribery charge was unfounded because favorable city action on petitioner's real

estate projects would have occurred in any event based on the merits of the projects. This testimony was intended to suggest that the alleged bribery was unnecessary and, by extension, did not occur. *United States v. Krilich*, 159 F.3d 1020, 1026 (7th Cir. 1998). Petitioner did not testify.

The Government moved to admit petitioner's proffer statements in connection with the Government's rebuttal case on the ground that petitioner violated the proffer agreement by "present[ing] a position inconsistent with the proffer" based on the direct and cross-examinations conducted by his counsel. The trial court held a hearing on the admissibility of the proffer statements (Tr. 9/11-12/95, 2336-2438), and held in favor of the Government based on the language of the proffer agreement and what petitioner should have understood it to mean when he signed it. The court never heard any testimony from petitioner about what he actually understood or was told about the admissibility of the proffer statements. Petitioner tried to be heard at least twice during this hearing but was either stopped by counsel or ignored by the court:

> COURT: Let me hear from the Government on the question of whether the language of the Government's letter adequately alerted the defendant to the possibility that he might be visited with a proffer should he cross examine Government witnesses in a way that he has.
>
> * * *
>
> THE DEFENDANT: Am I allowed to say anything?
>
> MR. BERKSON [Defense Counsel]: No.
>
> * * *
>
> MR. BERKSON: Just for the record your Honor, I mean it is—there is [sic] two things. Number one, I just want it said that I think that in your ruling, which is a case of first impression, basically what you have done is you have made it so that Rule 11 is a nullity.

> Someone would have to be crazy to come in and make a proffer. That's number one. I don't think that was the intent of Congress when they—
>
> THE DEFENDANT: The Government lied.
>
> MR. BERKSON: —when they enacted Rule 11. I think that's directly contrary to the intent of Congress.

Tr. 9/11/95 at 2377-2378, 2390; see also *id.* at 2381-2382, 2384-2385. Petitioner sought to testify about what he understood the conditions of the proffer to be, and how he had been misled about the meaning of the agreement. A36, ¶ 18. Without hearing any of this evidence, the trial court's ruling permitted the Government to introduce petitioner's confession, which predictably led to his conviction.

On direct appeal, petitioner's counsel argued that "evidence obtained by cross-examination of the prosecution's witnesses does not count," and should not have opened the door to petitioner's confession. The Seventh Circuit rejected that contention on the ground that counsel's reading of the proffer agreement was "unrealistic"—*i.e.*, that the terms of the agreement authorized the government to use the proffer as it did, in response to testimony elicited by petitioner's counsel on cross-examination.

Petitioner also argued on appeal that he did not knowingly and voluntarily waive his rights against admission of plea statements pursuant to Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6). The Seventh Circuit rejected the claim on the ground that "Krilich does not contend that his assent was coerced and offers no support for a conclusion that he didn't understand the rights that Rules 410 and 11(e)(6) confer." 159 F.3d at 1026. Petitioner did not assert any claim that admission of the proffer statements violated his Fifth Amendment right against self-incrimination, recognizing instead that he would have to raise and develop that claim in collateral proceedings because it depended on the testimony of the prosecutor and petitioner's

counsel as to the representations made about the circumstances in which his proffer statements could be used against him.

On October 3, 2000, petitioner moved to vacate his sentence pursuant to 28 U.S.C. § 2255, seeking a new trial on the grounds that the admission of his statement violated his Fifth Amendment right against self-incrimination, and that he was denied the effective assistance of counsel. R. 1. The Government moved to dismiss the petition, arguing that petitioner's claims either had already been decided by the Seventh Circuit or were waived by virtue of not having been raised on direct appeal, and also that they lacked merit. In support of its motion, the Government submitted several pieces of evidence responding to the merits of petitioner's claims, including new affidavits from petitioner's former counsel denying that they had provided ineffective representation. R. 8.

At a status hearing on January 12, 2001, the district court indicated it would rule first on the question of procedural default, and thereafter would give the parties a separate opportunity to address whether the claims lacked merit or required an evidentiary hearing. 1/12/01 Tr. (R. 13), at 19, 20-21, 23-24. In response to the district court's directive, petitioner filed a response addressing only the alleged procedural bar, postponing his submission of factual materials and legal arguments, as well as his requests to develop extra-record evidence relating to the merits, until after the court ruled on the question of procedural default.

On April 5, 2001, the district court ruled that petitioner's ineffective assistance claims were not procedurally defaulted or waived because "it is typical for a criminal defendant to base an ineffective assistance of counsel claim on evidence outside the trial record," and because "[u]nder these circumstances, it is the defendant's 'privilege' to withhold the claim from his direct claim and pursue it in collateral proceedings." App., *infra*, 12a. The district court also held, however, that petitioner's Fifth Amendment claim *was* barred because, even though he had not

asserted such a claim in his direct appeal, "the Seventh Circuit applied nothing less than the test for determining whether a criminal suspect has waived his constitutional right to remain silent." *Id.* at 9a. Thus, according to the district court, the fact that the Seventh Circuit had ruled on voluntariness was itself sufficient to procedurally bar any Fifth Amendment claims that petitioner might have. Although the district court acknowledged that petitioner sought to rely "on evidence outside the trial record" in support of his Fifth Amendment claim, the court ignored the contention that petitioner's claim could not be procedurally defaulted because it was based on extra-record evidence and was inextricably intertwined with petitioner's timely ineffective-assistance claim.

On April 16, 2001, petitioner moved to vacate the dismissal pursuant to Fed. R. Civ. P. 59(e) and 60(b) in order to allow him an opportunity to develop extra-record evidence in support of his claims, as he originally had requested. R. 19. In support of that motion, petitioner submitted a detailed affidavit of his own supporting the merits of his claims. A33-A37.

On July 10, 2001, the district court denied petitioner's motion, and also refused to issue a Certificate of Appealability ("COA"), holding that even if petitioner's Fifth Amendment claim was not procedurally barred, the facts alleged by petitioner "do not bear significantly" on whether petitioner's Fifth Amendment rights were violated:

> Krilich claims that his attorney and the Assistant United States Attorney with whom he negotiated the proffer agreement misled him regarding the circumstances under which the Government would seek admission of his proffer statements if the case ultimately proceeded to trial. These facts, even if true, do not bear significantly on the question of whether Krilich knowingly and voluntarily waived certain rights by signing the proffer agreement.

App., *infra*, 22a. The court also refused to allow petitioner to develop a factual record in support of his Fifth Amendment and ineffective assistance claims, and then denied a Certificate of Appealability ("COA") as to the court's rulings. On appeal, the Seventh Circuit also denied petitioner's request for a COA. App., *infra*., 1a.

REASONS FOR GRANTING THE PETITION

The district court held that, because the court of appeals on direct appeal ruled on the voluntariness of petitioner's waiver of his statutory rights under Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) to exclude his proffer statements, he was procedurally barred from claiming on collateral review that the admission of the proffer statements violated his Fifth Amendment rights. According to the district court, because the issue of statutory voluntariness was raised on direct appeal, petitioner was barred from seeking habeas review of his separate, Fifth Amendment claim, regardless of whether this claim depended on extra-record evidence.

This ruling is flatly contrary to this Court's precedent and further muddles an already-confused split among federal courts as to when a federal prisoner may seek collateral review of a claim that depends on extra-record evidence but is related to another issue that was previously addressed on direct appeal. Some courts allow collateral review when there is relevant evidence that the petitioner was unable to introduce into the record. See, *e.g.*, *United States v. Palumbo*, 608 F.2d 529, 533 (3d Cir. 1979). Other cases employ the cause and prejudice or actual innocence standard applicable to a prisoner who defaults by failing to raise an issue on direct appeal. This standard, however, is wholly inappropriate for the federal prisoner who has raised a claim on appeal but who, unlike the state prisoner who can develop evidence in state habeas proceedings, has not had an opportunity to introduce evidence critical to his federal habeas claim. See, *e.g.*, *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001). The district court in this case strayed from

both of these views, erecting an absolute bar to collateral review, notwithstanding petitioner's reliance in his § 2255 petition on extra-record evidence that he was unable to develop at trial.

This Court should grant the petition to resolve this important split and to clarify the law concerning the impact of rulings on direct appeal on the rights of habeas petitioners to seek collateral review of related issues under § 2255 that depend on extra-record evidence. Indeed, the split among the federal courts reveals pervasive confusion on at least three levels of habeas corpus jurisprudence.

First, there is confusion over the extent to which this Court's § 2254 precedents have overruled by implication earlier holdings applicable to § 2255 review, and, more specifically, the extent to which this Court's procedural default holdings apply to claims preserved on direct appeal. This Court's last word on this issue came in 1969, see *Kaufman v. United States*, 394 U.S. 217, 227 & n.8 (1969), but since then, decisions from the § 2254 context, see, *e.g.*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and from other procedural default contexts, see, *e.g.*, *Davis v. United States*, 411 U.S. 233, 242 (1973), have caused some courts to abandon *Kaufman*'s holding.

Second, while this Court has addressed the effect of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) on the ability of a *state* prisoner to seek habeas relief based on facts outside the state-proceeding record, see *Williams v. Taylor*, 529 U.S. 420 (2000), the post-AEDPA rules for federal prisoners are still deeply confused.

Third, the interests of comity and federalism, and of the availability of state collateral review, see *Coleman v. Thompson*, 501 U.S. 722, 726, 729-730 (1991), which have motivated this Court's decisions interpreting § 2254, do not apply to § 2255 petitions. The federal courts are therefore in vital need of guidance as to whether, and to what extent, this

Court's procedural default precedents under § 2254 have any application to § 2255.

The district court also erred in its resolution of the merits of petitioner's Fifth Amendment claim. The court concluded that false assurances by a prosecutor and defense counsel as to the circumstances under which a defendant's incriminating proffer statements may be used at trial (which in this case, according to the Seventh Circuit, precluded defendant even from cross-examining the Government's witnesses without opening the door to the admission of his proffer statements), have no "significant[]" bearing on the viability of defendant's Fifth Amendment waiver. This holding flatly contradicts this Court's holdings in other waiver contexts, and marks a sharp split with the approach that other federal courts have taken to evaluating the viability of Fifth Amendment waivers.

This Court and other federal courts have recognized that prosecutorial misstatements about the consequences of a constitutional waiver undermine the waiver's voluntariness. This is especially so here, where the government assured petitioner that his statements could only be used if he took the stand himself and contradicted his proffered statements, and where there were no available procedural safeguards (such as those that apply in the plea context), to ensure that petitioner's waiver was knowing and voluntary. Notwithstanding its assurances to petitioner, the Government proceeded to argue at trial that petitioner violated the proffer agreement, even though he never took the witness stand, by cross-examining government witnesses in a manner contrary to his proffer statements. The trial court and court of appeals agreed, allowing into evidence petitioner's incriminating proffer statements to rehabilitate prosecution witnesses in the Government's rebuttal case. This prosecutorial about-face devastated petitioner's trial strategy and his chances for an acquittal. The district court's holding that the Government's misrepresentations on this score did not affect the voluntariness of petitioner's plea is not only illogical and manifestly unfair,

but flies in the face of established jurisprudence from this and other federal courts.

In short, this case presents an ideal opportunity for the Court to address and resolve the split among the federal courts over the procedural default rules that govern 28 U.S.C. § 2255, and the extent to which Fifth Amendment waivers can be vitiated by false prosecution assurances.[1] At a minimum, this case satisfies the liberal standard for issuance of a COA. Indeed, for the reasons set forth below, "jurists of reason" would easily find the district court's procedural and substantive rulings "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (articulating standard for issuance of COA). Accordingly, even if the Court declines to reach the merits of petitioner's procedural and constitutional claims, the court of appeals should be directed to grant petitioner's application for a COA and to hear his appeal from the district court's denial of his § 2255 petition on the merits.

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[1] The Seventh Circuit's refusal to issue petitioner a Certificate of Appealability ("COA") is no impediment to this Court's review of petitioner's claims. This Court "has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals." *Hohn v. United States*, 524 U.S. 236, 253 (1998). In fact, the Court has exercised this jurisdiction repeatedly, reaching the merits of the underlying claims without regard to the COA denial. See, *e.g.*, *Penry v. Johnson*, 532 U.S. 782 (2001); *Weeks v. Angelone*, 528 U.S. 225 (2000); see also *Lynce v. Mathis*, 519 U.S. 433 (1997) (certificate of probable cause, precursor to COA); *Allen v. Hardy*, 478 U.S. 255 (1986) (same); *Smith v. Digmon*, 434 U.S. 332 (1978) (same); *Walker v. Wainwright*, 390 U.S. 335 (1968) (same).

ARGUMENT

I. PETITIONER'S FIFTH AMENDMENT CLAIM WAS NOT PROCEDURALLY BARRED BECAUSE IT WAS BASED ON EXTRA-RECORD EVIDENCE THAT HE WAS FORECLOSED FROM DEVELOPING AS PART OF THE ORIGINAL TRIAL RECORD.

The federal courts are split over the applicable standard for determining whether claims on collateral review under § 2255 are procedurally barred where related claims were addressed on direct appeal. Some courts allow collateral review when there are "new facts or new law," based upon a showing that there is relevant evidence that the petitioner was unable to enter into the record, newly discovered evidence, or a change in the law that would apply on collateral review. See *United States v. Palumbo*, 608 F.2d 529, 533 (3d Cir. 1979) (adding "other circumstances indicating that an accused did not receive full and fair consideration of his federal constitutional and statutory claims"); *United States v. Little*, 608 F.2d 296, 301 (8th Cir. 1979); *United States v. Abbott*, 975 F. Supp. 703, 705 (E.D. Pa. 1997) (following *Palumbo*); *Scire v. United States*, 1997 WL 138991, at *3 (E.D.N.Y. Mar. 24, 1997) (distinguishing between claims procedurally defaulted and claims raised and rejected on appeal).[2]

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[2] Some of these courts note that a party relying on evidence outside the record must show that the facts could not reasonably have been introduced at trial. See *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000) (refusing to address issue decided on direct appeal unless claim on collateral review is based on facts that could not reasonably have been discovered before trial); *Giacalone v. United States*, 739 F.2d 40, 43 (2d Cir. 1984) (rejecting claim of new evidence because facts could have been raised at trial with reasonable diligence of counsel); *United States v. Robinson*, 585 F.2d 274, 278-280 (7th Cir. 1978) (en banc) (refusing to address issue decided on direct appeal unless claim on collateral review is based on facts that could not reasonably have been discovered before trial).

Other cases use the "cause and prejudice or actual innocence" standard that applies to issues that a prisoner defaulted by failing to raise on direct appeal. See *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (en banc) (stating that, generally, court "must" apply cause and prejudice standard to § 2255 claims that were decided on direct appeal, but creating exception for ineffective assistance claims); *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001) (allowing collateral review of issues decided on direct appeal only when new evidence demonstrates actual innocence); *United States v. Hope*, 1993 WL 135751, *3 (N.D. Ill. Apr. 28, 1993) ("[F]or this court to consider new facts or evidence brought forth by the petitioner, the petitioner must first satisfy the cause-and-prejudice standard set forth in *Keeney v. Tamayo-Reyes*, [504 U.S. 1, 8 (1992)]"), appeal dismissed, 43 F.3d 1140 (7th Cir. 1994); *United States v. Marin-Pineda*, 1992 WL 300824, *1 (E.D. La. Oct. 7, 1992) (requiring "new evidence to support a colorable claim of factual innocence"). As explained below, this standard—imported from the § 2254 context—is manifestly unfair in § 2255 cases because the federal prisoner, unlike his state counterpart, may, as in this case, never have had the chance to develop extra-record evidence.

In the instant case, the district court held that a court of appeals' resolution of a related issue on direct appeal barred consideration of the issue on collateral review, notwithstanding the fact that petitioner sought to base his habeas claim on evidence outside the original trial record and without regard to

whether petitioner could demonstrate cause and prejudice.[3] App., *infra*, 8a-10a, 21a-22a.

This split in the circuits has roots going back fifty years to this Court's original holding that habeas corpus is available to address claims relying on extra-record evidence. The modern understanding of habeas corpus review is traceable to *Waley v. Johnston*, 316 U.S. 101, 104-105 (1942), in which this Court abandoned the fiction that the Great Writ can only be used to collaterally attack a judgment of conviction rendered without jurisdiction. In so doing, the Court held that a claim may be raised on federal collateral review whenever "[t]he facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal." *Id.* at 104.

Later cases reiterated that allegations of evidence "dehors the record" entitled a prisoner to habeas review of factual allegations. *Townsend v. Sain*, 372 U.S. 293 (1963), a § 2254 case, was the first decision to specify the conditions under which a federal court would consider factual issues that were ruled on at trial and on direct appeal. *Townsend* listed six grounds for granting an evidentiary hearing, one of which was that "the material facts were not adequately developed at the state-court hearing." *Id.* at 313. The basic principle underlying *Townsend* was that a prisoner has a right to a "full and fair hearing" of a constitutional claim, and that a hearing

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[3] As noted above, the district court ruled that because on petitioner's direct appeal the Seventh Circuit had ruled on the voluntariness of his waiver of Rule 410 and 11(e)(6) rights, petitioner was procedurally barred from raising a claim that his proffer was involuntary under the Fifth Amendment. The district court ignored petitioner's argument that his Fifth Amendment claim relied on facts outside the record, stating instead that the fact that voluntariness had been raised on direct appeal was sufficient, standing alone, to bar petitioner's Fifth Amendment claim on collateral review. Petitioner sought a COA on this ruling, but the Seventh Circuit rejected his application.

without the opportunity to completely develop the facts was not "full and fair." *Id.*

In *Kaufman v. United States*, 394 U.S. 217 (1969), this Court held that the logic of *Townsend* applied to § 2255. Thus, if facts were inadequately developed in a federal trial, § 2255 entitled a prisoner to an evidentiary hearing unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Id.* at 227 & n.8 (quoting 28 U.S.C. § 2255). Thus, by 1969, *Townsend* and *Kaufman* entitled state and federal prisoners to a hearing under § 2254 and § 2255, respectively, when their claims relied on evidence outside the record at trial, regardless of whether the prisoner's legal claim had been raised in earlier proceedings.[4]

This Court soon recognized a distinction between cases in which the prisoner had raised a claim on appeal and cases in which the prisoner has not. The Court first held that failure to timely raise an issue could constitute procedural default in *Davis v. United States*, 411 U.S. 233 (1973). *Davis* held that a § 2255 petitioner procedurally defaulted a constitutional challenge to his indictment by failing to comply with Fed. R. Crim. P. 12(b)(2), which requires challenges to the indictment to be raised before trial. *Davis* further held that a prisoner can overcome the default by demonstrating cause and prejudice for the default. *Id.* at 242. The cause and prejudice standard was subsequently applied to procedural defaults under state law. See *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

Since *Sykes*, the law of procedural default has evolved almost exclusively in the § 2254 context. See, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (cause and prejudice standard applies to all defaults under an independent and

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[4] A narrow exception to this liberal rule was provided by *Fay v. Noia*, 372 U.S. 391, 439 (1963), which held that a prisoner who deliberately bypassed appellate procedures or state-court collateral review was barred from seeking federal habeas relief.

adequate state procedural rule); *McClesky v. Zant*, 499 U.S. 467, 493 (1991) (cause and prejudice standard applies to abuse of writ); *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (cause must be external to the defense or rise to the level of ineffective assistance of counsel).

Indeed, in the § 2254 context, this Court has developed a coherent doctrine of procedural default that is detached from its original ties to federal collateral review under § 2255. The doctrine of procedural default, this Court has explained, operates as a necessary corollary to the "independent and adequate state ground" doctrine, *Coleman,* 501 U.S. at 730, and is "grounded in concerns of comity and federalism." *Id.* at 729-730; see also *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

Recognizing the availability of collateral remedies under state law and the importance of federalism, this Court has held that failure to develop evidence in state proceedings amounts to a procedural default. *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), held that a petitioner who failed to develop facts in a state-court collateral review proceeding must demonstrate cause and prejudice, or make a showing of actual innocence, before an evidentiary hearing on habeas review in federal court is allowed. *Id.* at 11-12. In so doing, the *Tamayo-Reyes* Court explicitly overruled the holding in *Townsend v. Sain* that the inadequate development of evidence in state court justified a federal evidentiary hearing. *Id.* at 5-6.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) codified the holding of *Tamayo-Reyes*. See 28 U.S.C. § 2254(e)(2). But the AEDPA did not alter the language of § 2255 governing when a petitioner is entitled to an evidentiary hearing; the language remains the same as it was when *Kaufman* was decided over thirty years ago.

Thus, the split among the federal courts reflects apparent confusion surrounding three issues: First, although *Tamayo-Reyes* overruled the holding of *Townsend* as it applies

to evidence not developed in state collateral review proceedings, this Court has not overruled the holding of *Kaufman* as it applies to evidence not developed in *federal* trial proceedings. In the absence of a definitive pronouncement from this Court, some lower courts still follow the rationale of *Kaufman*, while others recite the cause and prejudice standard of *Tamayo-Reyes*.[5]

Second, although most of the courts divided on this issue do not address the text of § 2255, federal post-conviction review is obviously statutory in nature. See, *e.g.*, *Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We start, as always, with the language of the statute") (interpreting § 2254). Congress, in enacting the AEDPA, significantly modified both § 2254 and § 2255. As amended, § 2254 now codifies the holding of *Tamayo-Reyes* that failure to develop facts in state collateral review proceedings is a procedural default. *Williams*, 529 U.S. at 432-33. But while the AEDPA made significant changes to § 2255, it left unaltered the portion of § 2255 that *Kaufman* interpreted to allow collateral review when the federal prisoner proffers evidence "dehors the record." See 28 U.S.C. § 2255 (2001) ("Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall * * * grant a prompt hearing thereon"). Ordinary principles of statutory construction thus dictate that—with respect to claims relying on evidence outside the record—these statutory sections mean different things.

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[5] In a recent § 2255 ruling, this Court referred to the *Waley* "dehors the record" rule as "an exception to the procedural default rule for claims that could not be presented without further factual development." *Bousley v. United States*, 523 U.S. 614, 621 (1998). Because the petitioner's claim in *Bousley* relied solely on evidence in the record, this Court had no opportunity to clarify the relationship between the dehors the record "exception" and the procedural default rule. *Id.*

Third, although the interest in finality applies to both state and federal convictions, the interests in comity and federalism motivating the decisions in *Tamayo-Reyes* and other § 2254 cases apply only to review of state-court convictions. Further, in *Tamayo-Reyes* the state prisoner had a prior, state habeas hearing in which he could develop evidence that was outside the trial record. A federal prisoner who is unable to create a record at trial, in contrast, has only one opportunity to develop such evidence: a § 2255 hearing. Because this Court's cases on collateral review primarily have been § 2254 cases, there is no Supreme Court guidance as to how to balance the concerns of finality and efficiency with the vindication of constitutional rights when concerns about federalism do not tip the scale.

The likely source of this circuit split is a misunderstanding of how the "cause and prejudice" standard applies in this context. As this Court explained in *Williams*, 529 U.S. at 436, courts should "not equate prisoners who exercise diligence in pursuing their claims with those who do not." When an issue has been raised and decided on appeal, the prisoner has preserved the issue, not waived it. Thus, in the context of claims relying on evidence outside the record, procedural default arises not from the fact that the issue was previously decided, but from the prisoner's failure to attempt to introduce the facts into the record at trial. See *Williams*, 529 U.S. at 432. In this context, "failure" to develop facts requires some fault, some lack of diligence, on the prisoner's part. *Id.* Thus, even under § 2254, a claim relying on evidence outside the record of state-court proceedings is not procedurally defaulted if a state prisoner acted with diligence in attempting to develop the facts.

Therefore, courts should not invoke the cause and prejudice standard until they have determined that the prisoner has in fact procedurally defaulted. This raises a two-step inquiry. First, the court may decline to revisit an issue decided on direct appeal if the prisoner has raised no new facts or applicable law that could possibly change the outcome. This is the holding of *Kaufman*, 394 U.S. at 226-227 & n.8. Second, if the prisoner

does allege new facts, the § 2255 court must determine whether the absence from the record of the facts proffered by the prisoner is due to a lack of diligence by the prisoner in attempting to discover those facts and bring them to the trial court's attention. If so, only then must the court require the prisoner to show cause for the default and prejudice.

Application of the *Kaufman* standard in the instant case would entitle petitioner to an evidentiary hearing and resolution of the merits of his Fifth Amendment claim. This claim is based entirely on evidence whose absence from the trial record is not the result of any lack of diligence on petitioner's part. Petitioner claims that the admission of his incriminating proffer statements violated his Fifth Amendment rights. This claim depends on extra-record evidence that he was prevented from developing at his original trial, including the testimony of AUSA King and his own counsel concerning their representations to petitioner as to the circumstances under which his proffer statements could be used against him at trial. Petitioner cannot be faulted for being unable to compel the testimony of the very AUSA that served as lead counsel for the prosecution at petitioner's trial. Indeed, AUSA King would have been put in the position of vouching to the credibility of the confession he sought to enter into the record. No standard of diligence could possibly require a prisoner to achieve such absurd results; courts have openly recognized this in other contexts. See, *e.g.*, *Page v. United States*, 884 F.2d 300, 301 (7th Cir. 1989) ("Few of us have insight into our shortcomings; fewer still have the nerve to flaunt our own failings * * * . [T]rial counsel need not attack his competence during trial.").[6] Moreover, the record confirms that petitioner attempted to testify during the original trial proceedings as to the misrepresentations on which he relied in agreeing to make the

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[6] As noted above, petitioner tried to tell the court, "The Government lied," but was not heard. Tr. 9/11/95 at 2390.

incriminating proffer statements, and was ignored by both the court and his counsel. See *supra* at pp. 4-5.

In this case, however, the lower courts erected an absolute bar to raising issues decided on direct appeal regardless of whether the § 2255 claim depended on extra-record evidence. Not only is this procedural bar contrary to the governing statute and Supreme Court precedent, but the injustice of applying it is apparent from the district court's treatment of petitioner in this case.

The district court essentially used its procedural bar holding to whipsaw petitioner between his Fifth and Sixth Amendment claims. On direct appeal, the Seventh Circuit berated petitioner's claimed understanding of the proffer agreement as "unnatural," "unrealistic," and as invoking "Humpty Dumpty's power over language," 159 F.3d at 1025-1026. And on collateral review, the district court held that the Seventh Circuit's decision procedurally barred Krilich from arguing that his waiver was not intelligent and knowing, even though he proffered evidence (that was "dehors" the record) to show that his counsel and AUSA King led him to believe their "Humpty Dumpty" interpretation of the proffer agreement was correct.

Yet the district court did not rely on the Seventh Circuit's ruling to find that petitioner's counsel rendered unreasonable assistance.[7] Instead, the court held that counsel's "Humpty

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[7] Ironically, the district court entertained Krilich's ineffective assistance claim, noting (correctly) that it was not procedurally barred *because it relied on evidence outside the record*. The courts of appeals unanimously find ineffective assistance claims not barred on collateral review, even if first raised on direct appeal. See, *e.g.*, *Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993) ("Primarily, though, ineffective assistance claims are appropriately brought in § 2255 petitions even if overlooked on direct appeal because resolution of such claims often requires consideration of matters outside the record on direct appeal"); *United States v. Higdon*, 832 F.2d 312, 313-314 (5th Cir. 1987) (declining to address

Dumpty" interpretation of the proffer agreement was reasonable, citing petitioner's evidence that his counsel's misinterpretation was shared by AUSA King. Thus, when petitioner attempted to show that his counsel and the prosecutor led him to adopt a "Humpty Dumpty" interpretation of the proffer agreement, the district court held that extra-record evidence could be used to show that counsel was reasonable in giving the wrong advice to petitioner, but not to show that petitioner's Fifth Amendment waiver was involuntary.

In short, petitioner's Fifth Amendment claim is based entirely on extra-record evidence he was never allowed to develop at his trial. He was thus denied a full and fair hearing on this claim because he did not bring his § 2255 petition in a circuit that properly permits habeas review where, as here, a habeas petitioner's challenge rests on evidence that petitioner was unable to make a part of the trial record.

II. THE LOWER COURTS' REFUSAL TO ISSUE A CERTIFICATE OF APPEALABILITY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In his § 2255 petition, petitioner argued that he did not knowingly, intelligently, or voluntarily waive his Fifth Amendment rights when he entered into the proffer agreement with federal authorities. Petitioner claimed, specifically, that he agreed to make the inculpatory statements only after both his attorney and AUSA King assured him (falsely) that the government could only introduce such statements to impeach petitioner's testimony if he took the stand and contradicted his proffer.

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claim on direct appeal when "no opportunity existed to develop the record on the merits of the allegations" but noting that claim may be brought under section 2255 although raised on direct appeal); *United States v. Carlson*, 561 F.2d 105, 109 (1st Cir. 1977) (citing *Waley*).

Although petitioner was unable to develop a factual record on these misrepresentations at trial, the district court refused to consider his Fifth Amendment claim when petitioner sought to raise it in his petition under § 2255. The court's refusal followed from its holding that, "even if true, [the allegations of misstatements by petitioner's counsel and the prosecutor] do not bear significantly on the question of whether [petitioner] knowingly and voluntarily waived" his Fifth Amendment "rights by signing the proffer agreement." App., *infra*, 22a. The district court thus concluded, as a matter of law, that false assurances that petitioner's inculpatory statements would not be used unless he took the stand and contradicted his proffer could not render his Fifth Amendment waiver unknowing, unintelligent, or involuntary.

This holding is squarely contrary to a long line of this Court's decisions and the approach taken by other federal courts. This Court has made plain, for example, that a guilty plea is involuntary when induced by government "misrepresentation" about the consequences of the plea. *Brady v. United States*, 397 U.S. 742, 755, 757 (1970); see also *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (holding that petitioner was entitled to habeas relief if guilty plea was induced by prosecutorial misrepresentations about total sentence petitioner would receive if he pled guilty); see also *United States v. Russell*, 686 F.2d 35, 41 (D.C. Cir. 1982) (prosecutor misrepresented deportation consequences of plea); *United States v. El-Nobani*, 145 F. Supp. 2d 906, 917-918 (N.D. Ohio 2001) (same); *West v. Johnson*, 2001 WL 461002, at *6-*8 (N.D. Tex. Apr. 30, 2001) (prosecutor did not fulfill oral promise regarding sentence, notwithstanding Government's adherence to language of plea agreement); *Quartararo v. Mantello*, 715 F. Supp. 449, 459-462 (E.D.N.Y.) (police misstatement regarding co-defendant confession and false promise of leniency), *aff'd*, 888 F.2d 126 (2d Cir. 1989); *United States v. Ready*, 82 F.3d 551, 556-558 (2d Cir. 1996) (defendant did not knowingly waive right to appeal illegal sentence due to

misleading statements by court). Indeed, "[w]hen the record indicates that the defendant's plea has been induced by inaccurate prosecutorial suggestions about its consequences, * * * the plea cannot be considered voluntary and must be vacated." *Russell*, 686 F.2d at 41; see also *United States v. Parrino*, 212 F.2d 919, 921 (2d Cir. 1954) (recognizing that guilty plea induced by misinformation from court or prosecutor may be basis for relief).

This principle is not limited to guilty pleas. Courts have repeatedly refused to admit confessions and other self-incriminating statements when they were induced by false assurances (innocent or not) about their potential uses and consequences. Thus, for example, in *United States v. Swint*, 15 F.3d 286, 287 (3d Cir. 1994), the defendant met with a state prosecutor "to make an off-the-record proffer regarding the cooperation he could provide in exchange for a negotiated plea" on pending state charges. During the meeting, however, federal agents entered the room and questioned defendant about conduct related to possible federal charges, and defendant made self-incriminating statements in response. The district court excluded these statements from defendant's federal trial as involuntary, and the Third Circuit affirmed, citing "the government's misleading conduct" and defendant's resulting confusion over the prosecution's ability to use his purportedly "off-the-record" statements against him at trial. *Id.* at 289-292; see also *United States v. Walton*, 10 F.3d 1024, 1028-1032 (3d Cir. 1993) (statements inadmissible where defendant was told that statements to agents would be off the record).

Likewise, in *United States v. Fronk*, 173 F.R.D. 59 (W.D.N.Y. 1997), defense counsel claimed that the Government had assured him that nothing his client said in preliminary discussions would be used against him at trial. Although the AUSA denied making any such assurance, the Government failed to meet its burden of proof on this score, and the court held that the prosecutor's false assurance rendered defendant's waiver involuntary. *Id.* at 71; see also *United*

States v. Heatley, 39 F. Supp. 2d 287, 299 (S.D.N.Y. 1998) (holding that government should "be held to its assurances if [its] assurances were relied upon by the defendant in deciding whether to enter a proffer session" and that, "[i]n order for the waiver of [Fifth Amendment] rights to be truly knowing, voluntary, and intelligent, there must be some assurance that the promises made by the government which induce that waiver will be enforced"); *United States v. Rogers*, 906 F.2d 189, 192 (5th Cir. 1990) (holding confession involuntary where defendant was misled into thinking that he would not be prosecuted); *United States v. Salisbury*, 966 F. Supp. 1082, 1085-1087 (N.D. Ala. 1997) (holding statements involuntary where investigator misled defendant into thinking that another individual, not defendant, was the target of investigation), appeal dismissed, 158 F.3d 1204 (11th Cir. 1998). But see *United States v. Byram*, 145 F.3d 405, 408 (1st Cir. 1998) (holding that statement is not involuntary even if made after detective's false suggestion that defendant was not subject of investigation).

This case involves a straightforward application of this general principle that inculpatory statements induced by false prosecutorial assurances are inadmissible under the Fifth Amendment. Here, the Government induced petitioner to waive his Fifth Amendment rights with the specific assurance that his statements would only be admitted if he took the stand and contradicted his proffer. This was a powerful misrepresentation of incredible significance to petitioner—one that led him not to take the witness stand in his own defense. There is a critical distinction between using inculpatory statements solely to rebut the defendant's testimony, and using them instead (as prosecutors did here) to counter defendant's cross-examination of government witnesses. Indeed, permitting the Government to introduce a proffer based on defense counsel's cross-examination strategy or counsel's arguments to the jury interferes with a defendant's "Sixth Amendment rights to cross-examination, to make closing arguments, or to call

witnesses on [the defendant's] behalf." *United States v. Lauersen*, 2000 WL 1693538, at *7 (S.D.N.Y. Nov. 13, 2000); see also *United States v. Duffy*, 133 F. Supp. 2d 213, 216-218 (E.D.N.Y. 2001) (expressly rejecting Seventh Circuit's decision on direct appeal in this case and holding that proffer agreement permitting Government to use proffer statements as Government did in petitioner's case constitutes unenforceable waiver of Sixth Amendment rights to advance defense and to effective assistance of trial counsel). At least one court has thus acknowledged the "groundswell of doubt * * * concerning the enforceability of [a] waiver contained in [a] Proffer Agreement, 'at least when the waiver extends beyond the use of the statements to impeach the defendant.'" *Lauersen*, 2000 WL 1693538, at *8 (citing cases, including *United States v. Mezzanatto*, 513 U.S. 196, 211 (1995) (Ginsburg, J., concurring)).

Given the crucial distinction between using a proffer in rebuttal and introducing it in the prosecution's case in chief, it is no surprise that false promises like those at issue here—where the prosecutor falsely assures the defendant that inculpatory statements will only be used to rebut the defendant's own trial testimony—have been found to render the defendant's statements inadmissible. Thus, for example, in *United States v. Rowley*, 975 F.2d 1357, 1360 (8th Cir. 1992), federal prosecutors elicited self-incriminating information from the defendant by assuring him that such information would only be used for purposes of impeachment. Because the Government had in fact used the information solely for these purposes, the Eighth Circuit held, defendant's Fifth Amendment claim failed. But the Court of Appeals recognized that "[a]ny breach of [the Government's] promise [to limit use of defendant's statement to impeachment] would, of course,

render his statements" involuntary and, accordingly, "unusable." *Id.* at 1362.[8]

This same principle was used to limit drastically the admissibility of a proffer statement in *Lauersen*. The defendant in that case entered into a proffer agreement allowing federal prosecutors to "'use statements made by [defendant] * * * and all evidence obtained directly or indirectly therefrom for the purpose of cross-examination should [defendant] testify, or to rebut any evidence or arguments offered by or on behalf of [defendant] * * * at any stage of the criminal prosecution.'" 2000 WL 1693538, at *2. Although the agreement included this permissive language, neither the defendant's attorney nor the prosecutor informed her that the Government could use defendant's proffer statements—as the Government did at petitioner's trial—to rebut positions advanced by defense counsel during opening/closing arguments or during cross-examination of government witnesses. *Id.* at *7. The district court concluded that, under these circumstances, "the Government ha[d] not demonstrated that [defendant] knowingly waived her rights as to the admissibility of statements made during her proffer for purposes beyond impeachment," and the court therefore held that defendant's "waiver [was] valid only to the extent it permit[ted] the Government to use her proffer statements for impeachment purposes should she testify." *Ibid.*

Petitioner plainly would have prevailed under the legal rule recognized in *Rowley* and *Lauersen*, a rule itself derived from the "voluntariness" principles articulated by this Court and established in the courts of appeals. The proffer agreement petitioner signed—which permitted the Government to use petitioner's statements "for impeachment or in rebuttal testimony"—was not nearly as informative as the agreement in

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[8] The court went so far as to implore prosecutors to instruct defendants in even greater detail on possible uses of their pre-trial statements, "[t]o avoid a ruling that information proffered will be considered involuntarily given." 975 F.2d at 1362 n.4.

that case. Nor was petitioner's proffer merely "incompletely explained," as it was in *Lauersen*. Petitioner has alleged that AUSA King, not to mention petitioner's own lawyer, affirmatively misinformed petitioner that his statements were inadmissible unless he took the stand and personally advanced a contrary position. Far from providing relief on this ground, however, the district court here deemed these misrepresentations "insignificant" to petitioner's Fifth Amendment claim as a matter of law, and the Seventh Circuit found this ruling so obviously correct as to be unworthy of review.

* * * * *

This case presents an opportunity for the Court to resolve a conflict among the federal courts over the Fifth Amendment implications of prosecutorial misstatements that induce a self-incriminating proffer. The Seventh Circuit has taken a position on this critical issue at odds with the rule applied by other courts of appeals and district courts, and the Seventh Circuit's position flies in the face of this Court's jurisprudence.

CONCLUSION

The petition for writ of certiorari should be granted for this Court's resolution of the questions presented on their merits. Alternatively, the decision of the court of appeals should be vacated and the court of appeals instructed to issue a certificate of appealability as to the questions raised in this petition.

Respectfully submitted.

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FEBRUARY 2002

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 01-2835 & 01-2836

ROBERT R. KRILICH,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 00 C 6078—Charles P. Kocoras, *Judge*

Submitted September 20, 2001
Decided September 28, 2001

Before

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

O R D E R

Robert Krilich has filed an application for a certificate of appealability from the denial of his motion brought under 28 U.S.C. § 2255. This court has reviewed the final order of the district court and the record on appeal. We find no substantial

showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	00 C 6078
vs.	)	
	)	94 CR 419-1
ROBERT R. KRILICH, SR.,	)	
	)	

[Docketed April 6, 2001]

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on Robert Krilich, Sr.'s motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, we deny the motion.

BACKGROUND

In approximately March 1993, Petitioner Robert Krilich, Sr. learned that he was under federal investigation for bribery and other crimes in connection with suspected government corruption in Oakbrook Terrace, Illinois. Krilich retained Jeffrey Steinback, who was concurrently representing his son, Robert Krilich, Jr. ("Rob Krilich"), in an unrelated federal investigation, to represent him. Allegedly in an attempt to obtain a favorable plea bargain for his son, Krilich decided to cooperate in the government's investigation of his and his companies' past activities.

In December 1993, prior to Krilich's substantive cooperation with the investigation, the United States Attorney's Office for the Northern District of Illinois (the "Government") provided Krilich with a standard proffer letter (the "proffer agreement") stating that anything related to the government during a proffer could not and would not be used against Krilich in the Government's case-in-chief or in aggravation of Krilich's sentence. The letter warned, however, that the Government could use the proffer statements for impeachment or in rebuttal if Krilich "should subsequently testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer." According to Krilich's § 2255 petition, Steinback advised Krilich that the government could only use his statements at trial if he were to take the stand and testify inconsistently with the statements he provided in proffer interviews or put on a witness who testified directly contrary to those statements. Krilich was allegedly never informed that his cross-examination of the Government's witnesses at trial, or the presentation of circumstantial evidence of his innocence through defense witnesses, could potentially open the door to the introduction of his proffer statements.

Based on his understanding of the proffer agreement, Krilich submitted to a number of interviews in which he provided substantive information about his activities to the United States Attorney's Office, the FBI, and the Internal Revenue Service. In particular, Krilich admitted that he bribed Oakbrook Terrace Mayor Richard Sarallo in order to obtain favorable commercial zoning, that he effected the bribe through a phony $40,000 hole-in-one contest in which he personally ensured the success of the mayor's son, and that he shifted the cost of the bribe to the National Hole-In-One Association, from whom he had obtained an insurance policy to cover the contest. Krilich also admitted falsifying vendor invoices in order to withdraw, for his own personal use, municipal bond sale

proceeds raised to finance Krilich's development projects. Krilich was ultimately unable to come to an agreement with the government regarding a plea in part, he claims, because of his insistence on bartering his cooperation for leniency in the Government's treatment of his son. As a result, Krilich was indicted and proceeded to trial.

Krilich was represented at trial not by Steinback but by two other attorneys, Dennis Berkson and Harry Samuels. Berkson and Samuels were aware of the proffer agreement and the statements Krilich had made pursuant to its execution. In order to avoid opening the door to the introduction of Krilich's proffer statements, Berkson and Samuels advised Krilich not to take the stand, and he agreed, stating on the record that he waived his right to testify. *See* Tr. at 2356. Berkson and Samuels also avoided eliciting from defense witnesses testimony that they believed directly contradicted the information in the proffer. They did, however, conduct broad cross-examination of the Government's witnesses, some of whom were friendly to Krilich, on topics covered by the proffer, and elicited circumstantial evidence of Krilich's innocence from defense witnesses on direct examination.

Following the close of Krilich's case, the Government argued that defense counsel had "present[ed] a position inconsistent with the proffer" and sought leave to introduce portions of the proffer in rebuttal. Over defense counsel's objections, the court permitted the Government to introduce in evidence Krilich's proffer statements to the effect that he had staged the hole-in-one contest in order to effect a bribe to the mayor and that he had falsified invoices to obtain municipal bond proceeds for his personal use. Krilich was then convicted of fraud and conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) and sentenced to 64 months in federal prison.

Krilich appealed his conviction, arguing *inter alia* that the trial court erred in permitting the Government to introduce evidence of the proffer. Krilich, through appellate counsel Berkson and Samuels, argued first that the waiver clause in the proffer agreement should be limited to evidence presented by the defendant's own witnesses and should exclude evidence obtained by cross-examination. The Court of Appeals disagreed, opining that the defense position "would be an unnatural reading of the language":

> Evidence is evidence, whether it comes out on direct or cross-examination. One can "otherwise present" a position through arguments of counsel alone, so it is easy to see how a position can be "presented" by evidence developed on cross-examination and elaborated by counsel. When the prosecution's witnesses are inclined to accommodate the defense, as many were in this case, developing one's position through cross-examination is especially attractive. *Krilich*, 159 F.3d at 1025.

The court then went on to hold that the trial court's finding of a "genuine inconsistency" between the proffer and the evidence presented, through any means, by the defendant at trial was not clearly erroneous. The court noted that the defense had cross-examined the Government's witnesses in such a way as to suggest that Krilich was not at the ninth hole at the time the mayor's son supposedly hit the winning hole-in-one and that no bribes were required because the city attorney thought the new zoning to be correct. It also found defense counsel's questioning of the defendant's own witnesses to be inconsistent with the proffer in that their testimony implied that it was unlikely that any bribes were ever made.

Krilich also argued on appeal that if the trial judge's ruling was not erroneous, then Krilich's waiver of the plea statement rules was unknowing and involuntary, and thus unenforceable. The court ruled that under Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure, "[a] waiver is voluntary in the absence of coercion and is knowing if made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Krilich*, 159 F.3d at 1026 (citations and quotation marks omitted). Because Krilich had shown neither that his assent was coerced or that he lacked an understanding of the rights he was relinquishing, the court found that the waiver was enforceable under Rules 410 and 11(e)(6).

In the end, the Seventh Circuit affirmed Krilich's conviction and vacated and remanded his sentence. *United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 42 (1999). On November 1, 2000, this Court (Judge Coar) issued a judgment and commitment order sentencing Krilich to a term of 87 months' imprisonment. Both Krilich and the Government have appealed this sentence. With those sentencing appeals pending, Krilich has filed this § 2255 petition challenging the validity of his conviction on Fifth and Sixth Amendment grounds. The Government has both answered and moved to dismiss the petition.

DISCUSSION

I. Fifth Amendment

Krilich seeks a new trial on the ground that his Fifth Amendment privilege against self-incrimination prior to trial was violated when the trial judge admitted the proffer statements. He contends that the conditional waiver of rights contained in the proffer agreement was invalid in that he did

not intentionally, knowingly, and intelligently waive his Fifth Amendment rights. In essence, Krilich argues that both Steinback and AUSA King led him to believe that his proffer statements could be used against him only if he testified, and could not be introduced if he were to cross-examine government witnesses regarding their veracity or present defense witnesses who would provide circumstantial evidence suggesting his innocence.

The Government asserts that this issue is procedurally defaulted either because Krilich raised it on appeal, or because he failed to raise it despite being able to do so. Krilich responds that he did not, and could not, raise the Fifth Amendment issue on appeal because his argument relies on evidence outside the record. He further contends that the Seventh Circuit's finding that he knowingly and voluntarily waived his Rule 410 and Rule 11(e)(6) rights is not conclusive on the issue of whether the waiver of his Fifth Amendment rights was also knowing and voluntary. For the reasons discussed below, we find this latter argument to be meritless and the issue to be dispositive of Krilich's Fifth Amendment claim.

An issue raised on direct appeal cannot be re-argued on habeas absent changed circumstances of fact or law. *Norris v. United States*, 687 F.2d 899, 900 (7th Cir. 1982). In his direct appeal to the Seventh Circuit, Krilich argued that the conditional waiver of his statutory right to exclude as evidence at trial pretrial "plea statements" was unenforceable because he did not sufficiently understand the conditions under which such statements could become admissible. Applying the constitutional test for evaluating the voluntariness of confessions in criminal cases, the court found that Krilich's waiver of these rights was neither coerced nor unknowing. Krilich now argues on habeas that the conditional waiver of his *constitutional* right to exclude as evidence at trial the same

pretrial "plea statements" is unenforceable, again arguing that he did not sufficiently understand the conditions under which such statements could become admissible. He contends that this is a separate issue from the one he raised on appeal, since the Seventh Circuit purportedly never conducted a "Fifth Amendment waiver analysis."

There is no question that the rights guaranteed by the Fifth Amendment are broader than those conferred by Rules 410 and 11(e)(6). However, the specific Fifth Amendment right that Krilich alleges was violated in his case – the right to have incriminating pretrial admissions excluded at trial absent a knowing and voluntary waiver – is precisely the same right protected by those statutory provisions. If Krilich's waiver of his right to keep the proffer out of evidence was knowing and voluntary, then it was knowing and voluntary. The source of that right is irrelevant to the waiver analysis.

Krilich argues that we must conduct a separate, independent Fifth Amendment waiver analysis because, he claims, the test for waiver of a constitutional claim is more stringent than the test for waiver of a statutory right. While this may sometimes be true, *see, e.g., Webb v. Keohane*, 804 F.2d 413, 414-15 (7th Cir. 1986) (waiver of statutory right need not always be knowing and intelligent), it is not always the case. In fact, in analyzing the validity of Krilich's conditional waiver of his Rule 410 and Rule 11(e)(6) rights, the Seventh Circuit applied nothing less than the test for determining whether a criminal suspect has waived his constitutional right to remain silent. *See Krilich*, 159 F.3d at 1026 (citing Fifth Amendment waiver cases of *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515 (1986), *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135 (1986), and *Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851 (1987)).

Nor does the presumption of waivability of Rules 410 and 11(e)(6) distinguish the rights conferred by those statutes from these arising under the Fifth Amendment, as Krilich suggests. *See U.S. v. Mezzanatto*, 513 U.S. 196, 115 S. Ct. 797 (1995). In holding that a criminal defendant's rights under Rules 410 and 11(e)(6) were presumably waivable, the Supreme Court in *Mezzanatto* relied on past decisions in which the Court had presumed that even fundamental constitutional rights, such as the right against self-incrimination, could be waived. 513 U.S. 196, 200-201 (citing, e.g., *Peretz v. United States*, 501 U.S. 923, 936, 111 S. Ct. 2661, 2669 (1991) and *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969)). Krilich makes much of the fact that Rule 410 and 11(e)(6) rights are presumed waivable while Fifth Amendment rights are presumed not to be waived in a given situation. These two propositions do not, however, establish that the analysis of whether waiver has occurred in a particular case varies with the right in question. Krilich is comparing apples and oranges; waivability and waiver-in-fact are separate issues.

We therefore find inadequate support for Krilich's position that "waivers of Rules 410 and 11(e)(6) are accomplished more easily than the Fifth Amendment protections" at issue in this case. At a minimum, we are convinced that the waiver analysis that the Seventh Circuit previously undertook, at Krilich's request, was identical to that he is now asking us to conduct in addressing his § 2255 petition. Krilich may not avoid the procedural bar and take a second bite at the apple merely by restyling his previously-adjudicated complaint as a constitutional claim.

II. Ineffective assistance of counsel

Krilich also moves to vacate his conviction on the ground that he was denied effective assistance of counsel prior to and

during trial. A § 2255 motion must be granted when a defendant's "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255; *Fountain v. United States*, 211 F.3d 429, 433 (7th Cir. 2000). Ineffective assistance of counsel claims are generally cognizable under § 2255. *Id.* at 433-34. However, "because counsel is presumed effective, a party bears a heavy burden in making out a winning claim based on ineffective assistance of counsel." *Id.* at 434, *quoting United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 1052 (1984). In order to prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that the deficient performance so prejudiced the petitioner's defense that it deprived her of a fair trial. *See Strickland*, 466 U.S. at 688-94. In assessing counsel's performance, we "evaluate the conduct from counsel's perspective at the time and indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional conduct." *United States v. Ashimi*, 932 F.2d 643, 648 (7th Cir. 1991). If the record supports a finding of substandard performance, we then determine whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *United States v. Starnes*, 14 F.3d 1207, 1209-10 (7th Cir. 1994).

A. Conflict of interest

Krilich argues that he received ineffective assistance of counsel in plea negotiations with the Government because, he claims, attorney Steinback labored under a conflict of interest. Steinback did concurrently represent both Krilich and his son in plea negotiations with the United States Attorney's Office in the Northern District of Illinois. And although the crimes in which the father and son were suspects were wholly unrelated,

there is evidence in the record suggesting that Krilich, with Steinback's assistance, attempted to barter cooperation with the Government in his own case for leniency in his son's. Krilich argues that Steinback's attempt to orchestrate this exchange created a conflict of interest which prevented Krilich from receiving effective legal representation.

The Government argues that the conflict of interest claim is procedurally defaulted because Krilich failed to raise it on direct appeal. As the Seventh Circuit noted in *Guinan v. U.S.*, 6 F.3d 468, 471 (1993), however, it is typical for a criminal defendant to base an ineffective assistance of counsel claim on evidence outside the trial record. Under these circumstances, it is the defendant's "privilege" to withhold the claim from his direct appeal and pursue it in collateral proceedings. Krilich's conflict of interest claim is clearly based on evidence outside the trial record, most notably the fact that Steinback concurrently represented Krilich's son. Krilich was therefore not required to raise his conflict of interest claim on direct appeal, and we will proceed to address it on the merits.

Criminal defendants are entitled to conflict-free representation. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). In bringing an ineffective assistance of counsel claim based on an alleged conflict of interest, the petitioner bears "a somewhat lighter burden" in satisfying the *Strickland* criteria. *Cabello v. United States*, 188 F.3d 871, 875 (7th Cir. 1999). Where, as here, the trial judge was not put on notice of a potential conflict, the petitioner must demonstrate that his counsel actively represented conflicting interests and that the conflict adversely affected the counsel's performance. *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708 (1980) and *United States v. Fish*, 34 F.3d 488, 492 (7th Cir. 1994)). He need not go further and show that there was a reasonable probability that

the outcome would have been different in the absence of conflict.

In order to succeed on this ineffective assistance claim, therefore, Krilich must demonstrate that his interests and his son's were in conflict. The crimes for which Krilich and Rob Krilich were under investigation were wholly unrelated; neither man could provide information or otherwise directly affect the outcome of the other's case. Indeed, the only nexus between the two cases was the elder Krilich's desire to obtain leniency for his son. In pursuit of this end, Krilich actively sought to link his fate to his son's. For example, Krilich asserts in his habeas petition that he "agreed to cooperate and to provide information to the United States Attorney's Office because he believed that providing such assistance would, in turn, cause the government to offer his son more lenient treatment." *See* § 2255 Motion at p. 4. The petition goes on to allege that, "[a]s both Steinback and AUSA King were aware, Mr. Krilich's paramount interest in cooperating with the government was to favorably affect the disposition that would be reached in the prosecution of his son, Rob Krilich." *Id.*; *see also* September 12, 1995, Declaration of Jeffrey B. Steinback (stating, in support of one of Krilich's motions for reconsideration, that "Mr. Krilich was highly motivated to resolve [the pending criminal case] in his son's favor through almost any means"). To the extent that Steinback assisted Krilich in seeking leniency for his son, therefore, that assistance was provided in furtherance of Krilich's expressed interests, not contrary to them. Krilich has not cited a single case in which a conflict of interest has been found under these circumstances.

Even if an argument could be made that Steinback's dual representation presented a conflict, Krilich cannot demonstrate that his pretrial representation was adversely affected by that conflict. According to Krilich, Steinback's desire to protect Rob

Krilich's interests led him to advise Krilich to sign the proffer agreement without either negotiating a more favorable waiver provision or properly informing his client about the terms of the existing waiver provision. In particular, Krilich argues, Steinback should have advised him that by entering into the proffer agreement, he was foregoing the ability to vigorously cross-examine government witnesses and to present circumstantial evidence of his innocence through defense witnesses. However, as Krilich himself has argued at other points in this litigation, Steinback's advice about the proffer agreement was solidly based on the attorney's then-understanding of the terms of the agreement. On September 13, 1995, for example, Krilich filed a motion for reconsideraton of the trial court's decision to permit introduction of the proffer statements. In support of this motion, Krilich filed a declaration from Steinback in which the attorney attested, under oath, that "during the hundred-plus proffer interviews that [he had] engaged in with the United States Attorney's office for the Northern District of Illinois," he had never understood the waiver provision in the proffer letter "to mean that defense counsel's cross-examination of the Government's witnesses at trial could somehow open the door to introduction of a defendant's statements against him." *See* Brief in Opposition to the Government's Allegations of Procedural Bar, Exh. 2 at ¶ 6-7. He further stated that "[i]f I knew that this provision of the standard form proffer letter could be used against this defendant in this manner, then I would never have advised Mr. Krilich to enter into such a proffer interview arrangement with the Government." *Id.*, Exh. 2 at ¶ 7. On August 18, 1997, Krilich submitted another affidavit from Steinback in support of his Motion to Reconsider Bond Pending Appeal. In this second affidavit, Steinback reiterated that based on his significant experience negotiating plea agreements with the U.S. Attorney's office, "[i]t never even occurred to me to

advise Mr. Krilich as to anything different" than he did regarding the meaning of the waiver provisions of the proffer agreement. *See id.*, Exh. 5 at ¶ 5.

Having affirmatively presented this testimony twice when it suited him, Krilich cannot now argue, in the absence of new factual developments, that an evidentiary hearing is necessary to test the veracity of Steinback's sworn statements. As a result, Krilich cannot establish that he was denied ineffective assistance of counsel as a result of Steinback's simultaneous representation of Krilich and Krilich's son. This holding does leave open the question of whether Steinback's failure to predict the circumstances under which the proffer statements might become admissible was within the bounds of professional competence. However, for the reasons set forth in the following section, that claim, too, is unavailing.

B. Conditional waiver and admission of proffer statements at trial

Krilich next argues that he was denied the effective assistance of counsel at trial. It is undisputed that Krilich's trial attorneys, Berkson and Samuels, elicited testimony on direct and cross-examination which the trial court, and later the Seventh Circuit, found to have opened the door to the admission of damaging admissions from Krilich's proffer interviews. The question is whether Berkson and Samuels' decision to put on the case that they did was objectively unreasonable.

As stated above, our review of trial counsel's performance is highly deferential. *U.S. v. Meyer*, 234 F.3d 319, 324-25 (7th Cir. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984) and *Lowery v. Anderson*, 225 F.3d 833, 843 (7th Cir. 2000). In assessing counsel's performance, we "evaluate the conduct from counsel's perspective at the

time, and indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional conduct." *United States v. Ashimi*, 932 F.2d 643, 648 (7th Cir. 1991). Applying this standard, we cannot conduct that Krilich was denied the right, guaranteed under the Sixth Amendment to the U.S. Constitution, to effective representation of counsel in a criminal trial.

In *United States v. Dortch*, 5 F.3d 1056, 1067-69 (7th Cir. 1993), the Seventh Circuit held that "if the defendant elicits or adduces testimony at trial that is 'materially different' from his proffer statements, the government may use his proffer statements to impeach the witness if the defendant has executed a valid waiver." It is clear from the record that Berkson and Samuels were aware of the ruling in *Dortch* at the time of Krilich's trial. It is also undisputed that they were aware of Krilich's proffer agreement and the requirement that he not "present a position inconsistent with" the proffer. Nevertheless, Berkson and Samuels believed – incorrectly, as it turns out – that *Dortch* precluded a defendant only from eliciting on direct examination testimony that directly contradicted his proffer statements. Operating on this belief, Berkson and Samuels attempted to put on a defense case through avenues they considered to fall outside the Seventh Circuit's ruling in *Dortch* – cross-examination and the presentation through defense witnesses of circumstantial evidence of the defendant's innocence. What we must decide is whether their actions "might be considered sound trial strategy." *U.S. v. Pergler*, 233 F.3d 1005, 1010 (7th Cir. 2000) (quoting *Foster v. Schomig*, 223 F.3d 626, 631 (7th Cir. 2000)).

The trial judge thought so. Although he eventually ruled against them, Judge Grady remarked on the record that Berkson and Samuels' strategy was "intelligent" in light of the unsettled state of the law and the near impossible task counsel would

have faced in mounting a defense without treading on the territory of the proffer. *See* Tr. at 2377; *see also* Tr. at 2365 ("THE COURT: ...the case law maybe hasn't evolved to the point where they are talking about a strictly cross examination type situation."). And while the Seventh Circuit did opine that Berkson and Samuels' interpretation of the proffer agreement "would be an unnatural reading of the language," *Krilich*, 159 F.3d at 1025, it is evident that Krilich's trial attorneys were not alone in their understanding of the terms of the agreement. According to the aforementioned September 12, 1995 and August 18, 1997 declarations of Jeffrey Steinback, for example, Steinback had come to an identical conclusion about the meaning of the proffer agreement based on 33 years as a criminal defense attorney in the Northern District of Illinois. In the August 18 affidavit in particular, Steinback asserts that he was personally aware of only four prosecutions that proceeded to trial after the defendant signed a proffer agreement. In the three cases in which the defendant did not take the stand, the proffer statements were not used against him even though the case was close and the defense engaged in vigorous cross-examination that contradicted the proffer. *See* August 18, 1997 Affidavit of Jeffrey B. Steinback at ¶ 6. In an amicus curiae brief filed in support of Krilich's direct appeal, the Federal Defender Program and Illinois Attorneys for Criminal Justice echoed Steinback's assertion that the trial court's reading of the proffer agreement was inconsistent with the custom and practice in the Northern District of Illinois.[1]

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[1] Krilich even contends in support of the Fifth Amendment claims in his petition that *AUSA King* advanced this same interpretation of the waiver provisions of the proffer agreement.

In light of this significant evidence of shared confusion, we cannot conclude that Berkson and Samuels' attempt to put on a vigorous defense while preventing admission of the proffer statements was so far outside the wide range of professional competence as to be constitutionally deficient. As Judge Grady explained, counsel took a gamble which failed to work out as they had hoped. Although we now know, with the benefit of hindsight, that Berkson and Samuels' (and Steinback's) interpretation of the "otherwise present a position inconsistent" language was incorrect, we are required under *Strickland* to evaluate the challenged conduct from counsel's perspective at the time it occurred. *Ashimi*, 932 F.2d at 648. Prior to and at the time of Krilich's trial, counsel's actions, taken against a backdrop of widespread confusion about the breadth of the conditional waiver contained in the Government's standard proffer letter, were simply not objectively unreasonable. Accordingly, we reject the claim that Krilich's trial attorneys' performance was constitutionally deficient.

In any event, Krilich cannot show the prejudice necessary for him to recover on his ineffective assistance of counsel claims. In its case-in-chief, the Government presented eyewitness testimony from Krilich's bagman and others regarding bribes Krilich paid to Oakbrook Terrace officials and false invoices he submitted for the municipal bond proceeds. With respect to the hole-in-one contest in particular, the Government's witnesses testified that Krilich had sent the spotter away from the tee before the mayor's son arrived there, had bent over the prize hole shortly before the mayor's son was announced to be the winner, and had falsely listed two witnesses to the winner's staged hole-in-one. In addition to this testimony, the Government presented documentary evidence which showed that the proceeds of the bond funds had been used by Krilich to purchase a car and make a payment on his yacht. In light of this significant evidence of Krilich's guilt,

Krilich cannot establish "a probabililty that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 446 U.S. 694.

III. Summary

In our view, Krilich has failed to allege facts which, if proven, would entitle him to relief under the Fifth or Sixth Amendments to the United States Constitution. Because the record conclusively demonstrates that Krilich's claims must fail, Krilich is not entitled to an evidentiary hearing. *See Stoia v. United States*, 22 F.3d 766, 768 (7th Cir. 1994). We therefore deny the § 2255 motion, in its entirety, on the record before the Court at this time.

CONCLUSION

For the foregoing reasons, Robert Krilich's § 2255 motion to vacate, set aside, or correct his sentence is denied.

/s/
Charles P. Kocoras
United States District Judge

Dated: April 5, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	00 C 6078
vs.	)	
	)	94 CR 419-1
ROBERT R. KRILICH, SR.,	)	
	)	

[Docketed July 11, 2001]

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on Robert R. Krilich's (1) motion for a certificate of appealability from our dismissal of his § 2255 motion; (2) motion for a certificate of appealability from our denial of his Rule 59(b) motion to vacate the § 2255 dismissal; and (3) Rule 60(b) motion for relief from the § 2255 dismissal. For the reasons set forth below, we decline to issue the certificates of appealability and deny the Rule 60(b) motion.

DISCUSSION

I. Certificates of appealability

A. Legal standard

Pursuant to 28 U.S.C. § 2253(c)(2), no appeal may be taken from the final order in a habeas corpus proceeding under 28 U.S.C. § 2255 unless a circuit justice or judge issues a

certificate of appealability. A certificate of appealability under this section may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This rule does not require a petitioner to show that he would prevail on the merits. *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S. Ct. 3383 (1983). "Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Id.* (internal quotations and citations omitted) (brackets in original).

B. Appeal from denial of § 2255 petition

1. Waiver of Fifth Amendment rights

Krilich seeks to appeal this Court's ruling that he was procedurally barred from arguing on habeas that the waiver of his Fifth Amendment right to preclude the admission of his pretrial plea statements was not knowing and voluntary. We concluded that Krilich had raised this issue on direct appeal by arguing that he had never knowingly and voluntarily waived his right, under Federal Rules of Evidence Rule 410 and Federal Rules of Criminal Procedure Rule 11(e)(6), to exclude the pretrial plea statements. Because the Seventh Circuit had applied the constitutional test in assessing the voluntariness of Krilich's waiver, we found no distinction between Krilich's Fifth Amendment and statutory claims. We therefore concluded that Krilich was barred from re-arguing the waiver issue on habeas.

Krilich contends that the Court was wrong in concluding that courts apply the same presumptions and standard of proof when evaluating alleged waivers of the statutory and constitutional rights to exclude evidence of pretrial proffer statements. In support of his argument, Krilich cites the case of

United States v. Wenger, 58 F.3d 280, 281-82 (7th Cir. 1995). *Wenger* draws no clear distinction between statutory and constitutional rights. Rather, the case holds that "the most vital constitutional rights," such as the right to counsel, are more difficult to waive than certain other rights, including the Fourth Amendment right to privacy and "*the right to exclude from evidence [a] proffer made as part of plea negotiations.*" *Id.* (emphasis added). *Wenger* therefore fails to support Krilich's position and, as set forth in our April 5, 2001, Memorandum Opinion, the other authority in this circuit is also against him.

Krilich next argues that the Seventh Circuit's finding of waiver is not conclusive on habeas, as the constitutional claim raised in his § 2255 petition is supported by evidence outside the record on appeal. In particular, Krilich claims that his attorney and the Assistant United States Attorney with whom he negotiated the proffer agreement misled him regarding the circumstances under which the Government would seek admission of his proffer statements if the case ultimately proceeded to trial. These facts, even if true, do not bear significantly on the question of whether Krilich knowingly and voluntarily waived certain rights by signing the proffer agreement. Thus Krilich has failed to demonstrate a good reason for this Court to reexamine the Seventh Circuit's ruling that his waiver was knowing and voluntary, as the law of the case doctrine requires. *See United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991) (habeas petitioner faces "uphill battle" in persuading district court to reexamine on habeas an issue previously adjudicated in course of direct appeal). We therefore deny the motion for a certificate of appealability with respect to this claim.

2. Ineffective assistance of pretrial and trial counsel

Krilich also seeks to appeal the Court's conclusion that he received constitutionally effective assistance from his pretrial and trial attorneys, Jeffrey Steinback, Dennis Berkson, and Harry Samuels. All three attorneys interpreted the terms of Krilich's proffer agreement as permitting Krilich to freely cross-examine government witnesses and present circumstantial evidence of his innocence without triggering admission of his proffer statements. As it turned out, the trial judge disagreed with counsel's interpretation, and the proffer statements were introduced as evidence at trial. Nonetheless, counsel's performance did not fall below an objective standard of reasonableness, as they were merely operating under an assumption that was commonly held among defense attorneys at the time. *See* Mem. Op. 18-20. Krilich's counsel did not misinterpret well-settled law, as did the attorneys in the cases Krilich cites in support of his most recent motion; they merely failed to predict the direction in which the law would develop. Reasonable jurists could not conclude differently, and we deny the certificate of appealability as to the question of whether the performance of Krilich's pretrial and trial counsel was constitutionally deficient.

3. Right to testify

Krilich finally requests a certificate of appealability on the question of whether his Fifth, Sixth, and Fourteenth Amendment rights were violated when his attorneys allegedly denied him the right to testify in his own behalf following the admission of the proffer statements. As discussed in detail in Part II below, Krilich never raised this issue in his § 2255 motion. While he did mention in a footnote that he had a desire to testify after learning that the proffer statements would be introduced, Krilich never suggested that his attorneys had

violated his constitutional rights by preventing him from testifying. As the issue was never raised, the Court never reached it. Accordingly, we decline to issue a certificate of appealability with respect to the purported denial of Krilich's constitutional right to testify in his own behalf.

C. Appeal from denial of Rule 59(e) motion

Following the dismissal of his § 2255 motion, Krilich filed a Rule 59(e) motion to vacate the dismissal order. In that motion, Krilich argued that the Court had erred in addressing his ineffective assistance of counsel claims before giving him an opportunity to demonstrate why he was entitled to an evidentiary hearing on those claims. In an April 19, 2001, Minute Order, the Court denied the motion on the basis that Krilich had in fact been afforded an opportunity to fully develop the factual and legal bases for his claims prior to the ruling on his § 2255 motion. We added that we had carefully reviewed the Sixth Amendment arguments in Krilich's Rule 59(e) motion and were unconvinced that the prior dismissal of those claims was improvident. Krilich now seeks to appeal the denial of his Rule 59(e) motion.

Krilich filed his habeas petition on October 3, 2000. The nineteen-page petition, styled as a § 2255 motion and memorandum of points and authorities in support thereof, contained detailed factual allegations and legal argument with respect to each of Krilich's Fifth and Sixth Amendment claims. On November 27, 2000, the Government responded to the petition by filing a substantive response as well as a motion to dismiss the petition on procedural grounds. At a January 12, 2001, status hearing, the Court requested that Krilich respond to the Government's motion to dismiss and hold any supplemental filings regarding the Government's substantive arguments until after the procedural questions had been

adjudicated. Krilich therefore filed a Brief in Opposition to Procedural Bar in response to the motion to dismiss.

The Court then reviewed all of the parties' submissions and determined that Krilich's Fifth Amendment claims were procedurally barred. We also determined at that time that Krilich had failed in his detailed § 2255 motion and memorandum in support thereof to raise any issue of material fact with respect to his claims. In making this determination, the Court considered the various categories of evidence that Krilich indicated, in his January 11, 2001, Status Report, that he intended to submit. We concluded that such evidence would not alter our conclusion that Krilich could not state a viable constitutional claim. A § 2255 petitioner is only entitled to an evidentiary hearing if "he alleges facts that, if proven, would entitle him to relief," *see Stoia v. United States*, 22 F.3d 766, 768 (7th Cir. 1994). Indeed, a court should dismiss a § 2255 motion "without a hearing where [it] plainly appears from the facts of the motion and any annexed exhibits and the prior proceedings in the case the movant is not entitled to relief." *Menzer v. United States*, 200 F.3d 1000, 1006 (7th Cir. 2000) (quotation marks omitted). Following these principles, we determined that no evidentiary hearing was warranted and proceeded to deny Krilich's Sixth Amendment claims on the merits.

We had occasion to reevaluate this decision when Krilich filed his Rule 59(e) motion to vacate the dismissal order. At that time, the Court again considered and rejected Krilich's claim that he was entitled to an evidentiary hearing on his claims. A review of Krilich's motion for a certificate of appealability leads to the same conclusion. To the extent that Krilich identifies facts which he claims are in dispute, those facts were not material to this Court's decision to dismiss the petition. As such, no evidentiary hearing was warranted.

Furthermore, we are unpersuaded that our decision to adjudicate the merits of the petition without first ordering additional discovery violated the law of the case doctrine. For one thing, that doctrine is no more than a presumption, *see Alston v. King*, 157 F.3d 1113 (7th Cir. 1998), and "is highly flexible, especially when a judge is being asked to reconsider his own ruling," *Pickett v. Prince*, 207 F.3d 402, 407 (7th Cir. 2000). Moreover, the Court's declaration of an intention to adopt a particular procedure with respect to the proceedings on Krilich's § 2255 motion was not the type of legal ruling to which we would ordinarily adhere under the law of the case doctrine. There was no reason to proceed with what the Court determined to be a futile collection of live testimony and other evidence, and Krilich cannot make a substantial showing that our refusal to do so violated his constitutional rights. We therefore deny the motion for a certificate of appealability on this issue.

II. Motion for relief from final judgment

On May 30, 2001, Krilich filed a Rule 60(b) motion for relief from this Court's dismissal of his § 2255 petition. He contends that the § 2255 proceedings should be reopened to permit him to demonstrate that his trial counsel provided him constitutionally ineffective assistance when they prevented him from testifying in sur-rebuttal after his proffer statements were admitted into evidence. The Court lacks jurisdiction to grant Krilich's Rule 60(b) motion outright, because Krilich has filed a notice of appeal from the very dismissal order he now seeks to vacate. *See Boyko v. Anderson*, 185 F.3d 672, 674 (7th Cir. 1999); *see also Kusay v. U.S.*, 62 F.3d 192, 194 (7th Cir. 1995) and *Venen v. Sweet*, 758 F.2d 117, 120 n. 2 (3d Cir. 1985) (listing limited exceptions to rule that one court at a time possesses jurisdiction over a case). The Court does, however, retain jurisdiction to deny the motion pending appeal. *Boyko*,

185 F.3d at 675. Moreover, if we were inclined to grant the motion, or believed an evidentiary hearing was necessary to determine the appropriate outcome, we could so indicate on the record, and Krilich could then seek remand from the Court of Appeals to enable this Court to act on the Rule 60(b) motion. *Id.* We therefore proceed to address the merits of Krilich's motion.

Rule 60(b) relief is an extraordinary remedy and is granted only in exceptional circumstances. *See McCormick v. City of Chicago*, 230 F.3d 319, 327 (7th Cir. 2000). In habeas cases, denial of Rule 60(b) relief is appropriate where a petitioner seeks consideration of an issue that he could have raised in his § 2255 motion but did not. *See Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000). Krilich's § 2255 petition asserted a variety of Sixth Amendment ineffective assistance of counsel claims; counsel's alleged refusal to permit Krilich to testify was not among them. The petition did reference Krilich's desire to testify after he learned the proffer would be admitted. However, this point was mentioned only in a footnote and was raised in support of Krilich's claim that the proffer statements were admitted in violation of his Fifth Amendment privilege against self-incrimination. *See* § 2255 Motion at 9 n. 3 (citing Fifth Amendment case of *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). Moreover, in his § 2255 petition Krilich blamed the trial judge for his failure to inquire about Krilich's desire to testify following the admission of the proffer statements. At no point in the petition, or in his later Brief in Opposition to Procedural Bar or his Rule 59(e) motion, did he suggest that his attorneys had prevented him from testifying and had violated his Sixth Amendment right to counsel in doing so.

Thus although we agree with Krilich that "this Court, in reviewing (and ultimately denying) his § 2255 Motion, was not

afforded the full opportunity to reach th[e] issue" of his attorneys' role in preventing him from testifying at trial, we note that the opportunity was lost because Krilich failed to timely raise the claim. Krilich has identified no exceptional circumstances that would justify this eight-month delay. Although Krilich has argued, in reference to his May 30 motion for extension of time to file a notice of appeal, that he had difficulties accessing his counsel beginning in or around April 2001, this fact does not explain Krilich's failure to address what he describes as "the denial of [a] fundamental constitutional right" in October 2000, when he filed his § 2255 petition. Accordingly, we find no support for Krilich's claim that he is entitled to the extraordinary remedy of Rule 60(b) relief and deny the motion.

CONCLUSION

For the foregoing reasons, Robert R. Krilich's two motions for certificates of appealability and his Rule 60(b) motion for relief from judgment are denied.

/s/
Charles P. Kocoras
United States District Judge

Dated: July 10, 2001

Supreme Court, U.S.
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No. 01-1277

In the Supreme Court of the United States

ROBERT R. KRILICH, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion under 28 U.S.C. 2255 on the ground that the motion raised a claim that had already been raised and rejected on direct appeal.

2. Whether petitioner made a knowing and voluntary waiver of his Fifth Amendment right to prevent the admission at trial of his incriminating plea proffer statements.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability (COA) (Pet. App. 1a-2a) is unreported. The opinion of the district court denying a COA (Pet. App. 20a-28a) also is unreported. The opinion of the district court denying petitioner's motion to vacate his sentence under 28 U.S.C. 2255 (Pet. App. 3a-19a) is reported at 163 F. Supp. 2d 943.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2001. On December 20, 2001, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including February 25, 2002, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 14 counts of making false statements to a federally insured bank, in violation of 18 U.S.C. 1014, and on one count of conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. 1962(d). He was sentenced to 64 months' imprisonment and ordered to pay a $1 million fine. Petitioner appealed his convictions, and the government cross-appealed the sentence. The court of appeals affirmed the convictions and remanded for resentencing. *United States* v. *Krilich*, 159 F.3d 1020 (7th Cir. 1998), cert. denied, 528 U.S. 810 (1999). On remand, the district court sentenced petitioner to 87 months' imprisonment. Petitioner appealed the sentence and the government cross-appealed, and the court of appeals again remanded for resentencing. *United States* v. *Krilich*, 257 F.3d 689 (7th Cir. 2001), cert. denied, 122 S. Ct. 1175 (2002). On remand, the district court sentenced petitioner to 135 months' imprisonment.

In 2000, following the first remand for resentencing, petitioner filed a motion for collateral relief under 28 U.S.C. 2255. The district court denied the motion, Pet. App. 3a-19a, and denied petitioner's application for a COA, *id.* at 20a-28a. The court of appeals also denied petitioner's request for a COA. *Id.* at 1a-2a.

1. Petitioner's conviction for making false statements to a federally insured bank was based on his submission of false invoices to obtain the use of municipal bond proceeds for impermissible personal purposes.

His separate conviction for RICO conspiracy was based on several acts of bribery and mail fraud. On one occasion, petitioner paid a bribe to a local mayor to obtain a favorable zoning change. Petitioner also paid the mayor $40,000 to arrange for the issuance of municipal bonds to finance one of petitioner's development projects. That bribe was effectuated by staging a hole-in-one golf contest at which petitioner and others falsely created the impression that the mayor's son had made a hole-in-one, resulting in the payment of a $40,000 prize to the mayor's son from the insurer of the contest. Pet. App. 4a-5a; *Krilich*, 159 F.3d at 1024.

2. a. During the pre-indictment investigation, petitioner met with the government in an attempt to negotiate a plea. Petitioner read and signed a proffer agreement describing the circumstances in which his statements could be introduced by the government at trial. The agreement stated that if petitioner should:

> testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer, nothing shall prevent the government from using the substance of the proffer at sentencing for any purpose, at trial for impeachment or in rebuttal testimony, or in a prosecution for perjury.

159 F.3d at 1024. During the proffer interviews, petitioner admitted that he had bribed the mayor to alter the zoning of his property, rigged the hole-in-one contest, and arranged for the submission of false invoices to a bank in order to obtain municipal bond proceeds for his personal use. *Ibid.*; Pet. App. 4a-5a.

b. At trial, the district court found that petitioner had opened the door to the admission of those proffer statements through his cross-examination of government witnesses and through his direct examination of

his own witnesses. The court explained that petitioner had elicited testimony to show that "the Hole-In-One actually occurred," 9/11/95 Tr. 2375, that "no bribes were paid" to obtain the zoning change, *ibid.*, and that petitioner had no knowledge of the false invoices submitted to the bank, *id.* at 2388. See 159 F.3d at 1026. In doing so, the court held, petitioner had triggered the provision in the proffer agreement allowing use of the proffer at trial if petitioner "otherwise present[ed] a position inconsistent with the proffer." This was not "a case of [petitioner's] being blind sided," the court concluded, but "is a case of [his] entering into an agreement with the government that contained language that seems to me quite clearly to apply to this situation and being visited with the results of that agreement." 9/11/95 Tr. 2377.

c. Petitioner filed a motion for reconsideration, arguing that his waiver of his right to prevent introduction of the proffer at trial was invalid because neither his counsel nor the prosecutor had advised him that his cross-examination of government witnesses or his direct examination of defense witnesses could result in introduction of the statements. 9/13/95 Mot. for Reconsideration 2-3. In a hearing on the motion, petitioner's attorney during the plea negotiations testified that both he and the prosecutor had advised petitioner that the government could introduce the proffer if petitioner testified at trial in a manner inconsistent with his proffer statements. 9/12/95 Tr. 2406, 2410-2411. The attorney stated that, while he had given petitioner the proffer agreement to read, neither he nor the prosecutor had discussed with petitioner the potential use of the proffer if petitioner did not testify, or the meaning of the language in the agreement permitting use of the proffer if petitioner "otherwise present[ed] a

position inconsistent with the proffer." *Id.* at 2407, 2412, 2415-2416, 2419-2420. The prosecutor stated in the hearing that he could specifically recall only that he had told petitioner that the proffer could not be used in the government's case-in-chief. *Id.* at 2396.

The district court denied the motion for reconsideration. It rejected petitioner's argument that his waiver of his right to prevent introduction of the proffer at trial was not knowing and voluntary. The court held that the "otherwise" clause of the proffer agreement "obviously * * * refers to something different than testimony by the defendant which is contrary to the substance of the proffer," 9/12/95 Tr. 2433, and that petitioner could not "ignore [that] plain language by refusing to consider its significance and then claim ignorance of the plain meaning of that language," *id.* at 2432.

3. The court of appeals affirmed petitioner's convictions. *United States* v. *Krilich*, 159 F.3d 1020 (7th Cir. 1998), cert. denied, 528 U.S. 810 (1999).[1] Giving the proffer agreement "neither a stingy reading nor a generous one, but a natural reading," *id.* at 1025, the court held that petitioner had opened the door to introduction of his statements by "advanc[ing] a position inconsistent with the proffer" at trial, *id.* at 1026.

The court also rejected petitioner's argument that his waiver of his right under Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) to prevent the use of those statements at trial was invalid because neither his attorney nor the prosecutor had advised him that the testimony he elicited at trial could

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[1] The court also vacated the sentence and remanded for resentencing. 159 F.3d at 1030-1031. That aspect of the court's decision is not in issue here.

result in admission of the proffer. The court explained that, while a waiver is unenforceable if given involuntarily or unknowingly, that "is a far cry from saying that waivers mean whatever the defendants say they understood them to mean." 159 F.3d at 1026. "A waiver is voluntary in the absence of coercion and is knowing if made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Ibid.* (internal citations and quotation marks omitted). Petitioner's waiver satisfied that standard, the court held, because "[a] defendant's understanding of the *consequences* of his waiver need not be perfect; it was [petitioner's] understanding of the rights being relinquished, not of all possible repercussions of relinquishing them, that made his waiver knowing." *Ibid.*

4. Petitioner filed a motion for collateral relief under 28 U.S.C. 2255, alleging that his waiver of his Fifth Amendment right against compelled self-incrimination in the proffer agreement was invalid because the prosecutor had "provided incorrect and misleading information" about the circumstances in which the proffer could be introduced at trial. Mot. 8-9. Petitioner also alleged that both his attorney in plea negotiations and his trial counsel had provided ineffective assistance by failing to advise him correctly about the terms of the proffer agreement and by opening the door to the admission of his statements. Mot. 11-15.

The district court denied petitioner's Section 2255 motion. Pet. App. 3a-19a. The court held that petitioner was barred from challenging the validity of his waiver of Fifth Amendment rights because the validity of petitioner's waiver had already been resolved against him on direct appeal. *Id.* at 8a-10a. The court found no material distinction between petitioner's claim of an

invalid waiver of his Fifth Amendment rights in his Section 2255 motion and his claim of an invalid waiver of his rights under Rules 410 and 11(e)(6) on direct appeal. "In fact," the court emphasized, the court of appeals had addressed the latter claim on direct appeal by applying "the test for determining whether a criminal suspect has waived his constitutional right to remain silent." Pet. App. 9a. As a result, the "waiver analysis that the Seventh Circuit previously undertook" was "identical" to the one petitioner "is now asking us to conduct in addressing his § 2255 petition." *Id.* at 10a. The court concluded that petitioner could not "take a second bite at the apple merely by restyling his previously-adjudicated complaint as a constitutional claim." *Ibid.*

The district court also denied relief on petitioner's ineffective assistance of counsel claims. Pet. App. 10a-19a. The court held that his attorneys' performance had not been constitutionally deficient, and that petitioner, in any event, could not make the required showing of prejudice. The court explained that the government had "presented eyewitness testimony from [petitioner's] bagman and others regarding bribes [petitioner] paid * * * and false invoices he submitted for the municipal bond proceeds," as well as documentary evidence establishing petitioner's use of the proceeds to purchase a car and to make a payment on his yacht. *Id.* at 18a. "With respect to the hole-in-one contest in particular," the court observed, there was testimony showing that petitioner "had sent the spotter away from the tee before the mayor's son arrived there" and that petitioner "had falsely listed two witnesses to the winner's staged hole-in-one." *Ibid.* "In light of this significant evidence of [his] guilt," the court determined, petitioner could not establish prejudice. *Ibid.*

5. a. The district court denied petitioner's motion for a COA on all his claims. Pet. App. 20a-28a. In addressing petitioner's contention that his waiver of Fifth Amendment rights was invalid, the court reiterated that "the Seventh Circuit had applied the constitutional test in assessing the voluntariness of [petitioner's] waiver" and that he "was barred from re-arguing the waiver issue on habeas." *Id.* at 21a. The court rejected petitioner's argument that the resolution of the claim on direct appeal should not bar its assertion under Section 2255 because it was now "supported by evidence outside the record on appeal," *i.e.*, evidence that "his attorney and the [prosecutor] with whom he negotiated the proffer agreement misled him regarding the circumstances under which the [g]overnment would seek admission of his proffer statements if the case ultimately proceeded to trial." *Id.* at 22a. The court concluded that "[t]hese facts, even if true, do not bear significantly on the question of whether [petitioner] knowingly and voluntarily waived certain rights by signing the proffer agreement." *Ibid.* As a result, petitioner had "failed to demonstrate a good reason for * * * reexamin[ing] the Seventh Circuit's ruling that his waiver was knowing and voluntary." *Ibid.*

b. Petitioner also filed an application for a COA in the court of appeals, which was summarily denied. Pet. App. 1a-2a.

ARGUMENT

1. Petitioner contends (Pet. 12-21) that the federal courts disagree on the circumstances in which there is a procedural bar against obtaining review of a claim under Section 2255 based on extra-record evidence when the claim was already raised and rejected on direct appeal. That issue is not squarely implicated by the

district court's decision, however, and there is no conflict in the courts of appeals on the question.

a. According to petitioner, the district court "erected an absolute bar to raising issues decided on direct appeal regardless of whether the § 2255 claim depend[s] on extra-record evidence," Pet. 20, and the decision thus exacerbates a conflict among federal courts on the extent to which there is a procedural bar against seeking reexamination of a claim under Section 2255 on the basis of extra-record evidence when the claim was already raised on direct appeal. Contrary to petitioner's submission, the district court did not hold that the assertion of a claim on direct appeal effects an absolute procedural bar against its reassertion under Section 2255, regardless of any new evidence introduced in support of the claim. Instead, the court found that the particular extra-record evidence relied on by petitioner in this case, "even if true," could not alter the conclusion reached on direct appeal that his waiver was knowing and voluntary. Pet. App. 22a. He therefore had "failed to demonstrate a good reason" for "re-examin[ing] the Seventh Circuit's ruling" on the issue. *Ibid.*

Because the basis of the district court's decision was that the specific extra-record evidence identified by petitioner was not material to his claim—not that he was procedurally barred from seeking reexamination of the claim on the basis of extra-record evidence—the decision does not implicate the first question presented by the petition. In fact, the decision is fully consistent with the approach advocated by petitioner, according to which a "court may decline to revisit an issue decided on direct appeal if the prisoner has raised no new facts * * * that could possibly change the outcome." Pet. 18.

b. In any event, there is no conflict in the federal courts on the circumstances in which raising a claim on direct appeal effects a procedural bar against later seeking review of the same claim under Section 2255 on the basis of new evidence. This Court held in *Kaufman* v. *United States*, 394 U.S. 217 (1969), that courts may decline to review a claim under Section 2255 where the claim was raised and resolved on direct appeal. See *id.* at 227 n.8. It is now "well settled" in the courts of appeals "that a § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances." *Jones* v. *United States*, 178 F.3d 790, 796 (6th Cir.), cert. denied, 528 U.S. 933 (1999); see *United States* v. *Sanin*, 252 F.3d 79, 83 (2d Cir.), cert. denied, 122 S. Ct. 492 (2001); *United States* v. *Wiley*, 245 F.3d 750, 752 (8th Cir. 2001), cert. denied, 122 S. Ct. 818 (2002); *United States* v. *Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000), cert. denied, 531 U.S. 1131 (2001); *United States* v. *DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994); *United States* v. *Taglia*, 922 F.2d 413, 418 (7th Cir.), cert. denied, 500 U.S. 927 (1991); *United States* v. *Prichard*, 875 F.2d 789, 791 (10th Cir. 1989); *Garris* v. *Lindsay*, 794 F.2d 722, 726 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986).

The decisions cited by petitioner (Pet. 12-13) do not suggest a conflict on the issue. Instead, they merely apply the general rule barring re-litigation under Section 2255 of claims raised and rejected on direct appeal, while noting certain exceptions to the rule that might apply in other situations. See *United States* v. *Palumbo*, 608 F.2d 529, 533 (3d Cir. 1979) ("in the absence of newly discovered evidence that could not reasonably have been presented at the original trial, or other circumstances indicating that an accused did not

receive full and fair consideration of his federal constitutional and statutory claims, a § 2255 petitioner may not relitigate issues that were adjudicated at his original trial and on direct appeal"), cert. denied, 446 U.S. 922 (1980); *United States* v. *Little*, 608 F.2d 296, 301 (8th Cir. 1979) (declining to reconsider claim raised on collateral review that was decided in prior appeal where defendant did not "allege[] the discovery of any additional evidence or any change in the law"), cert. denied, 444 U.S. 1089 (1980). See also *Wiley*, 245 F.3d at 752; *Nyhuis*, 211 F.3d at 1343. None of the opinions allows reassertion of a claim that was addressed on direct appeal, and none describes the circumstances in which re-litigation might be permitted in a manner that conflicts with another opinion.[2]

Finally, even if there were any disagreement in the courts of appeals on the circumstances in which extra-record evidence can justify re-litigation of a claim under Section 2255, this case would not present an appropriate vehicle for addressing the issue. None of the decisions relied on by petitioner contemplates reexamination of a claim in a Section 2255 proceeding based on evidence that was readily available on direct appeal. See, *e.g.*, *Palumbo*, 608 F.2d at 533 (suggesting possibility of re-litigation under Section 2255 based on "newly discovered evidence that could not reasonably have been presented" previously). As petitioner acknowledges (Pet. 19), relief under Section 2255 is unavailable where "the absence from the record of the facts proffered by the prisoner is due to a lack of diligence * * * in attempting to discover those facts and bring

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[2] Two of the decisions that petitioner submits are in conflict, *United States* v. *Little*, *supra*, and *United States* v. *Wiley*, *supra*, are from the same court of appeals.

them to the trial court's attention." Here, however, petitioner was fully aware of the prosecutor's statements to him about the scope of the waiver in the proffer agreement well before the time that questions about the validity of the waiver arose at trial. In fact, petitioner relied on the prosecutor's statements in his motion for reconsideration of the district court's ruling admitting the proffer and in his briefs on direct appeal. See 9/13/95 Decl. of Jeffrey B. Steinback 3; Pet. C.A. Br. 40-42; Pet. C.A. Reply Br. 19.

2. Petitioner also contends on the merits (Pet. 21-27) that his waiver of his Fifth Amendment right to prevent use of the proffer at trial was invalid because the prosecutor misled him about the circumstances in which the proffer could be introduced. That contention is limited to the specific facts of this case and does not warrant this Court's review. In addition, petitioner did not establish the factual predicate for his claim when the issue arose at trial, such as by filing an affidavit describing the prosecutor's alleged misrepresentations. While petitioner suggests (Pet. 19-20) that his counsel prevented him from testifying about the prosecutor's statements, any questions concerning his counsel's performance are properly considered in the context of petitioner's claims of ineffective assistance, which the district court rejected. Pet App. 10a-19a.

Finally, any error in allowing the government to use the proffer at trial was harmless. As the district court explained in determining that petitioner could not establish prejudice on his claims of ineffective assistance (Pet. App. 18a), the government introduced "significant evidence of [petitioner's] guilt" at trial aside from the proffer, including eyewitness testimony and documentary evidence establishing his payment of bribes to local officials, his submission of false invoices for the

municipal bond proceeds, and his fraudulent actions in connection with the hole-in-one contest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1277

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government devotes the great bulk of its response to the question of whether petitioner's Fifth Amendment claim was procedurally barred even though it was based on extra-record evidence that could not have been introduced at trial. In doing so, the government entirely skips over the many reasons why certiorari should be granted in this case. First, the government does not dispute the fact that the petition raises a significant issue of habeas corpus procedure that this Court has not addressed in over thirty years. Second, the government denies that there is a split in authority on this issue only by citing cases for a broad proposition over which the courts do not disagree, all the while ignoring the question over which there is discord. Third, despite the government's opposition, it is still fully apparent that petitioner would be entitled to relief in the event of a favorable ruling. Fourth, the government's claim that the district court did not procedurally bar petitioner's Fifth Amendment claim misstates the procedural history of this case. While the district court did invoke the merits as an alternative ground for denying the certificate of appealability, the court's ruling on the merits was in error and is the basis for the second question before the Court.

On the second question, which presents the merits of petitioner's Fifth Amendment claim, the government does not even attempt to defend the district court's decision or to deny that its decision conflicts with this Court's jurisprudence or decisions from other courts. The government instead attempts to describe this case as a poor vehicle for addressing the issue. For the reasons set forth below, however, the government's thinly veiled attempt to bury this Court in case-specific facts does not detract from either the compelling need for Supreme Court review or the fact that this case indeed provides a perfect vehicle for the resolution of this important issue.

I. The Government's Response Does Nothing To Undermine The Importance Of Petitioner's Procedural Question.

First, and most remarkably, the government fails to address the fact that this case presents the Court with a perfect vehicle to address an area of the law of procedural bar left unaddressed in more than thirty years of Supreme Court jurisprudence. As described in the petition, this Court's habeas corpus procedural bar cases can be sorted by two attributes: whether the case involved review of a state conviction (section 2254) or a federal conviction (section 2255), and whether or not the issue raised on collateral review had been raised on direct review. Consequently, this Court's decisions fall into four general categories. In the last thirty years this Court has abandoned preexisting precedent and laid down new rules in three of these categories. Petitioner asks this Court to consider the fourth.

The new rules in three of the four categories are well settled: (1) A state prisoner must show cause and prejudice for failing to raise an issue on direct appeal in state court. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), *rejecting Fay v. Noia*, 372 U.S. 391, 438 (1963) (stating that federal court may hold issue forfeited when prisoner "deliberately bypassed" state court appellate process). (2) Likewise, a federal prisoner must show cause and prejudice for failing to raise an issue on direct appeal in federal court. *Davis v. United States*, 411 U.S. 233, 242 (1973). (3) It is also clear what standards apply when a state prisoner invokes section 2254 to introduce extra-record evidence in support of a claim he *did* raise, unsuccessfully, on direct appeal in state court. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992), *overruling Townsend v. Sain*, 372 U.S. 293, 313 (1963) (allowing federal courts discretion to deny an evidentiary hearing only when "the state-court trier of fact has after a full hearing reliably found the relevant facts").

This Court's precedent has remained unchanged in one context, however. *Kaufman v. United States*, 394 U.S. 217, 226-227 (1969), still is the controlling authority when a federal prisoner seeks section 2255 review of issues that were raised on direct appeal. *Kaufman* held that when a federal petitioner presents a claim on collateral review that was raised on direct appeal, "discretion may in a proper case be exercised against the grant of a § 2255 hearing." 394 U.S. at 227 n.8. When, however, "the material facts were not adequately developed" at trial, it is appropriate for the section 2255 court to conduct an evidentiary hearing. *Id.* at 226 (quoting *Townsend v. Sain*, 372 U.S. 293, 313 (1963)).[1]

The government acknowledges this much. Br. in Opp. 10. Yet some courts—either failing to distinguish between the section 2254 and section 2255 contexts or perhaps anticipating the demise of *Kaufman*—have held that a court does not have any discretion under section 2255 to entertain an issue raised on direct appeal unless "cause and prejudice" are shown. Thus, the time is ripe for this Court to reaffirm, revise, or reject the rule of *Kaufman*.

As explained in the petition (at 16-18, 20-21 n.7), revisiting *Kaufman* also will allow this Court to address four major tensions in the jurisprudence of habeas corpus procedure that are

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[1] As set out in the petition, petitioner's Fifth Amendment claim requires extra-record evidence of the government's assurances about the way the government could use petitioner's proffer at trial. Petitioner contends that the AUSA assured him that his self-incriminatory statements would only be admissible if petitioner took the stand and contradicted something in the proffer. At the government's urging, however, the district court ultimately agreed to admit the proffer statements—though petitioner had never taken the stand—because defense counsel's examination of other witnesses supposedly implied a legal theory inconsistent with the proffer. In so doing, the court recognized that its ruling essentially meant that defendants would trigger the admissibility of proffer statements simply by pleading "not guilty." 9/11/95 Tr. 2369.

at the root of the confusion in the lower courts on the rules governing issues raised under section 2255 that were raised on direct appeal:

(1) This Court will be able to clarify the extent to which more recent rulings in the section 2254 context affect older precedents in the section 2255 context.

(2) This Court will be able to revisit the language of section 2255—text that the AEDPA changed far less than the text of section 2254—to provide guidance on the statutory interpretation of section 2255 at a time when courts rely more on section 2554 cases than the text of section 2255 itself.

(3) This Court will have the opportunity to explain the relevance of precedents from the section 2254 context when applied to a context without the important concerns of comity between courts and federalism that are so salient in federal review of state court convictions.

(4) This Court also will be able to address the tension in the section 2255 context between the virtually unanimous view of federal courts that extra-record evidence justifies Sixth Amendment ineffective assistance claims on collateral review, even if these claims were raised on direct appeal, and the litany of federal decisions on the issue of whether extra-record evidence justifies hearing other constitutional claims on collateral review.[2]

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[2] In fact, the Solicitor General has taken the position before this Court that ineffective assistance of counsel claims should be brought under section 2255 rather than direct appeal because, *inter alia*, those claims generally "require[ ] consideration of matters that are outside the record on direct appeal." Resp. Br. at 6, *Billy-Eko v. United States*, No. 92-7897 (1993), quoted in *United States v. DeRewal*, 10 F.3d 100, 103 (3d Cir. 1993). There is no reason that this Court, or the Solicitor General, should ignore this reasoning in the face of a Fifth Amendment claim.

Second, the government's response misses the nagging circuit split that would be resolved by this Court's review. The government cites strings of cases that stand for the unremarkable proposition that a section 2255 petition generally may not be used to litigate an issue that was raised and decided on direct appeal. Petitioner does not contest that it is the general practice of the federal courts to deny consideration of issues raised in a section 2255 petition that were raised on direct appeal.[3]

But, as Judge Posner notes in *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991), "[i]t is easy to confuse a practice with a rule." The government's uncontroversial claim that relitigation is disfavored completely ignores the issue presented by the petitioner: the standard for determining when a section 2255 petitioner is entitled to an evidentiary hearing to develop extra-record evidence. On this issue, the federal courts employ substantially different standards. As described in the petition,

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[3] Indeed, most of the cases cited by the government are cited in the petition. Of the cases not discussed in the petition but introduced by the government, most do not elaborate on the applicable standard. *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993), and *United States v. Prichard*, 875 F.2d 789, 791 (10th Cir. 1989), say nothing more than that issues raised on direct appeal "generally" may not be considered on collateral review under section 2255. (In any case, *Prichard* predates *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (en banc), which applies the cause-and-prejudice standard to all section 2255 claims raised on direct appeal.) *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999), merely restates the general requirement of "exceptional circumstances," and *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991), refers obliquely to "an uphill battle."

Two of the government's cases provide additional evidence of the need for Supreme Court review, given that they describe standards that are consistent with neither *Kaufman* nor the procedural default cases. *United States v. Sanin*, 252 F.3d 79, 83 (2d Cir. 2001), would allow reconsideration "only where there has been an intervening change in the law." Accord *Garris v. Lindsay*, 794 F.2d 722, 726 (D.C. Cir. 1986) (involving an appeal from the District of Columbia court system seeking a certificate of probable cause under section 2253).

some courts follow *Kaufman*'s standard giving courts discretion to entertain petitions based on new evidence, while other courts have applied other standards, including the onerous cause-and-prejudice standard imported from procedural default cases. None of this is disputed by the government.

Third, under the facts of this case, the government's opposition offers nothing to cast any doubt that petitioner is entitled to relief under the correct legal rule. In response to this claim, the government makes the uncontroversial point that a federal court should not grant an evidentiary hearing when the new facts alleged by a section 2255 petitioner could reasonably have been introduced at trial. Br. in Opp. 11; see also Pet. 12 n.2. In doing so, the government ignores altogether the fact that the evidence petitioner seeks to introduce at a hearing on his Fifth Amendment claim could not reasonably have been introduced at trial. For example, AUSA King could not reasonably have been expected to testify to the admissibility of the proffer he sought to introduce into evidence. Petitioner was also hushed by the court when he attempted to argue that he was misled about the terms of the proffer agreement. See Pet. 19-20 & n.6.[4]

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[4] Because the district court employed an erroneous procedural bar standard, it did not rule on whether the petitioner reasonably could have introduced the evidence at trial. In its response, the government refers to a hearing on petitioner's motion for reconsideration, Br. in Opp. 4-5, but this hearing provides no basis for claiming either that the trial record already includes the facts necessary to petitioner's Fifth Amendment claim or that petitioner had an opportunity to make them part of the record at trial. Petitioner raised his factual claims in an affidavit submitted to the district court in conjunction with his section 2255 filings. And the government never once claimed that the facts sworn to in the affidavit were already in the record or that petitioner could have introduced them before the trial court. The government has accordingly waived any claims to this effect. See, *e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below"). Nor would such a claim make any sense here. It would be wholly absurd to argue, for example, that AUSA

Fourth, the government tries to pretermit the procedural bar issue by arguing that "the basis of the district court's decision was that the specific extra-record evidence identified by petitioner was not material to this claim—not that he was procedurally barred." Br. in Opp. 9. This is wrong. The court clearly held that petitioner was procedurally defaulted. In denying petitioner's section 2255 motion, the district court made a single holding with respect to petitioner's Fifth Amendment claim: that the claim was procedurally barred, saying that petitioner "may not avoid the procedural bar and take a second bite at the apple." Pet. App. 10a. In denying the request for a certificate of appealability, the district court defended its procedural bar holding, but added an alternative argument that even if the court considered the evidence offered by petitioner, the evidence was not material to petitioner's claim. *Id.* at 22a. As explained below, however, this alternate holding is erroneous and itself presents the second question presented in the petition—an issue that equally warrants a grant of certiorari. Because the district court's ruling that petitioner's evidence was not material was clearly wrong, it is appropriate for this Court to consider the procedural bar issue raised by the district court's primary holding as to the Fifth Amendment claim.

II. This Case Presents An Ideal Vehicle For Addressing The Merits Of Petitioner's Fifth Amendment Claim.

The government addresses Question 2 only briefly, and it does not even attempt to deny that the district court's holding, *i.e.*, that whether the prosecutor misrepresented the possible uses of petitioner's self-incriminating proffer at trial is immaterial under the Fifth Amendment, is at odds with decisions by this Court and numerous lower federal courts. Instead, the government attempts to characterize this case as a poor vehicle for addressing

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King's statements at a hearing are a substitute for the full cross-examination sought by petitioner in support of his 2255 petition.

the merits of this significant Fifth Amendment issue. The government's efforts in this regard, however, are wholly misplaced.

First, the government claims that Question 2 is somehow limited to its facts. See Br. in Opp. 12. But that is plainly not so. The district court's holding was sweeping: in the court's view, the fact that "the Assistant United States Attorney * * * misled [petitioner] regarding the circumstances under which the Government would seek admission of his proffer statements," "even if true, do[es] not bear significantly on the question of whether [petitioner] knowingly and voluntarily waived certain rights by signing the proffer agreement." Pet. App. 22a. This holding raises a question unmoored from any particular set of facts—namely, whether a defendant can be said to have knowingly, intelligently, and voluntarily waived his Fifth Amendment rights if he "was induced to make incriminating proffer statements to the government based upon the prosecutor's false assurances as to the circumstances in which the petitioner's statements could be used against him." Pet. i. As the series of cases addressing this question makes plain, see *id.* at 23-25, this is a recurring issue of substantial importance to the Fifth Amendment rights of criminal defendants.

Second, the government contends that "petitioner did not establish the factual predicate for his claim [at trial] such as by filing an affidavit describing the prosecutor's alleged misrepresentations." Br. in Opp. 12. But the habeas court did not reject petitioner's Fifth Amendment claim on some theory that he should have proffered an affidavit at trial. Nor did the government make any such contention below, and this claim is therefore waived. See *supra* p. 6 n.4. The court instead unambiguously held that petitioner's allegations of prosecutorial misrepresentation were immaterial to his Fifth Amendment claim "even if true." Pet. App. 22a. That ruling is squarely presented for review by this Court.

Finally, the government claims that "any error in allowing the government to use the proffer at trial was harmless," citing the district court's finding that petitioner had not shown "prejudice" arising from his attorney's alleged ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). Br. in Opp. 12. The government does not, and cannot, claim that the district court's *Strickland* finding somehow implies or necessitates a finding of harmless error, however. Indeed, this Court has made plain that a defendant's burden of proving prejudice under *Strickland* is *higher* than the burden of proving harmless error on habeas review. See *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (explaining that harmless error standard applicable in federal habeas is less burdensome on criminal defendants than prejudice showing required under *Strickland*). Letting the jury hear what the trial court described as an "admi[ssion of] * * * guilt," 9/12/95 Tr. 2431, was of unquestionable importance to petitioner's case. As this Court recognized (in the course of rejecting a harmless error argument where a confession was erroneously admitted), "[a] confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The Court explained:

> [It] is probably the most probative and damaging evidence that can be admitted against [a defendant]. * * * [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

Ibid. (internal quotation marks omitted); see also *id.* at 313 (Kennedy, J., concurring) ("If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its

decision on that evidence alone, without careful consideration of the other evidence in the case").

Nothing in the district court's findings suggests that the admission of petitioner's proffer here, if constitutionally erroneous, was harmless.[5] Nor is the government in any position to claim that the admission was harmless, having fought to introduce petitioner's proffer during its rebuttal case and thus revealing the government's own view that its case-in-chief was vulnerable without it.

CONCLUSION

The petition for writ of certiorari should be granted for this Court's resolution of the questions presented on their merits. Alternatively, the decision of the court of appeals should be vacated and the court of appeals instructed to issue a certificate of appealability as to the questions raised in the petition.

Respectfully submitted.

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[5] Among the adverse evidence the government culls from the district court's opinions is the purported fact that petitioner used bond proceeds to buy a car "and to make a payment on his yacht." Br. in Opp. 7. Petitioner would have denied those assertions at trial, but he believed that he risked admission of the proffer if he took the stand and refuted any misstatements in the government's case. Had petitioner known that the proffer would come in anyway, he would have taken the stand and corrected such misstatements.